Supreme Court, U.S.
FILED

No. 94 831 NOV 7 1994

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THERMON PHILLIPS AND E.B. RICH,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

LAURENCE GOLD *
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
* Counsel of Record

ALBERT C. BOWEN
BEDDOW, ERBEN & BOWEN
2019 Third Avenue North
Birmingham, AL 35203

J. MARK WHITE
WHITE, DUNN & BOOKER
1200 First Alabama Bank Bldg.
Birmingham, AL 35203
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186, prohibits certain employer payments to union representatives, and § 186(d)(2) provides that a person who has made or received a prohibited payment is subject to criminal conviction for a violation of § 186 only upon proof that he "willfully violate[d] this section." The question presented is:

Whether the Eleventh Circuit erred:

(a) in treating the "willfully violates" requirement of § 186(d)(2) as an ambiguous term whose meaning turns on its statutory context and legislative history rather than, like the "willfully violating" requirement at issue in *Ratzlaf v. United States,* 114 S. Ct. 655 (1994), a term of art with a clear and settled meaning; and

(b) in holding that § 186(d)(2)'s "willfully violates" requirement permits a conviction based on a finding of general intent—*viz.*, that acts constituting a violation of § 186 were commited knowingly and intentionally rather than by accident or mistake—with no finding that the defendant knew, or was in reckless disregard of the fact, that those acts constituted a violation of law.

PARTIES

In addition to the parties listed in the caption, USX Corporation was a defendant in the district court and an appellant in the court below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Introduction	2
B. Statement of Facts	3
C. Proceedings Below	7
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	25

TABLE OF AUTHORITIES

CASES — Page

AFL-CIO v. Federal Election Comm., 628 F.2d 97 (D.C. Cir.), *cert. denied*, 449 U.S. 982 (1980) 16
Babcock & Wilcox Co. v. OSHRC, 622 F.2d 1160 (3d Cir. 1980) 16
Boys Markets, Inc. v Retail Clerks Union Local 770, 398 U.S. 235 (1970) 21
Brock v. Morello Bros. Construction, Inc., 809 F.2d 161 (1st Cir. 1987) 16
Browder v. United States, 312 U.S. 335 (1941) 14
Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 114 S. Ct. 1439 (1994) 21
Cheek v. United States, 498 U.S. 192 (1991) 18-19
Communications Workers of America v. Bell Atlantic Network Serv., Inc., 670 F. Supp. 416 (D.D.C. 1987) 6
Crandon v. United States, 494 U.S. 152 (1990) 14
Fedway Assocs., Inc. v. BATF, 976 F.2d 1416 (D.C. Cir. 1992) 17
Girouard v. United States, 328 U.S. 61 (1946) 21
Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993) 15
Helvering v. Hallock, 309 U.S. 106 (1940) 21
Lewin v. Blumenthal, 590 F.2d 268 (8th Cir. 1979) 16
McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988) 15, 21
Monsanto Co., 68 L.A. 101 (Dworkin, 1977) 5
Monsanto Co. v. Texas City, Texas Metal Trades Council, Civ No. H-78-199 (S.D. Tex. Mar. 9, 1978) 5
Perri v. BATF, 637 F.2d 1332 (9th Cir. 1981) 16
Potter v. United States, 155 U.S. 438 (1894) 13, 15
Ratzlaf v. United States, 114 S. Ct. 655 (1994) .... *passim*
Rodriguez v. Compass Shipping Co., 451 U.S. 596 (1981) 21
Spies v. United States, 317 U.S. 492 (1943) 14
Spurr v. United States, 174 U.S. 728 (1899) 15
St. Joe Minerals Corp. v. OSHRC, 647 F.2d 840 (8th Cir. 1981) 16

TABLE OF AUTHORITIES—Continued

	Page
Staples v. United States, 114 S. Ct. 1793 (1994)	18
Stein's, Inc. v. Blumenthal, 649 F.2d 463 (7th Cir. 1980)	16-17
TWA v. Thurston, 469 U.S. 111 (1985)	15
Toth v. USX Corp., 883 F.2d 1297 (7th Cir.), *cert. denied*, 493 U.S. 994 (1989)	6
Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941)	21
Trailways Lines Inc. v. Trailways, Inc. Joint Council, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932 (1986)	5, 6
United States v. Bloch, 696 F.2d 1213 (9th Cir. 1982)	23
United States v. Carter, 311 F.2d 934 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963)	22-23, 24
United States v. Consolidation Coal Co., 504 F.2d 1330 (6th Cir. 1974)	16
United States v. Davis, 583 F.2d 190 (5th Cir. 1978)	16
United States v. Dixon, 536 F.2d 1388 (2d Cir. 1976)	17
United States v. Golitschek, 808 F.2d 195 (2d Cir. 1986)	16
United States v. Inciso, 292 F.2d 374 (7th Cir.), *cert. denied*, 368 U.S. 920 (1961)	24
United States v. Jones, 735 F.2d 785 (4th Cir.), *cert. denied*, 469 U.S. 918 (1984)	16
United States v. Kaye, 556 F.2d 855 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977)	24
United States v. Keegan, 331 F.2d 257 (7th Cir.), *cert. denied*, 379 U.S. 828 (1964)	24
United States v. Lanni, 466 F.2d 1102 (3d Cir. 1972)	23
United States v. Macko, 994 F.2d 1526 (11th Cir. 1993)	16
United States v. Overton, 470 F.2d 761 (2d Cir. 1972), *cert. denied*, 411 U.S. 909 (1973)	23
United States v. Papia, 910 F.2d 1357 (7th Cir. 1990)	24

TABLE OF AUTHORITIES—Continued

	Page
United States v. Pecora, 484 F.2d 1289 (3d Cir. 1973)	23
United States v. Powell, 379 U.S. 48 (1964)	21
United States v. Ricciardi, 357 F.2d 91 (2d Cir.), *cert. denied*, 384 U.S. 942 (1966)	23
United States v. Ryan, 232 F.2d 481 (2d Cir. 1956)	23
United States v. Ryan, 350 U.S. 299 (1956)	23
United States v. Tooker, 957 F.2d 1209 (5th Cir.), *cert. denied*, 113 S. Ct. 187 (1992)	16
Yates v. United States, 354 U.S. 298 (1957)	21
Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971)	21

STATUTES

Section 302 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 186 ("LMRA")	*passim*
2 U.S.C. § 179f	10
2 U.S.C. § 437(d)(1)(A)	16
2 U.S.C. § 437g	9
5 U.S.C. App. 4	10
7 U.S.C. § 13	9
7 U.S.C. § 21	10
7 U.S.C. § 25	10
12 U.S.C. § 1908	10
12 U.S.C. § 1957	9
12 U.S.C. § 2183	10
15 U.S.C. § 77x	9
15 U.S.C. § 78ff(a)	17
15 U.S.C. § 80a	9
15 U.S.C. § 80b-3	10
15 U.S.C. § 717t	9
15 U.S.C. § 1674	9
15 U.S.C. § 1717	9
15 U.S.C. § 2072	10
16 U.S.C. § 9a	9
16 U.S.C. § 544m	10
16 U.S.C. § 1417	9
16 U.S.C. § 8250	9

TABLE OF AUTHORITIES—Continued

	Page
18 U.S.C. § 493	9
18 U.S.C. § 597	9
18 U.S.C. § 799	9
18 U.S.C. § 843	9
18 U.S.C. § 878	9
18 U.S.C. § 923	9, 16
18 U.S.C. § 1735	9
19 U.S.C. § 81r	10
22 U.S.C. § 618	9
22 U.S.C. § 2778	9, 16
22 U.S.C. § 3104	9
22 U.S.C. § 4117	10
26 U.S.C. § 7203	10
27 U.S.C. § 204	10, 17
28 U.S.C. § 1254(1)	2
29 U.S.C. § 216	10
29 U.S.C. § 439	10
29 U.S.C. § 502	10
29 U.S.C. § 522	10
29 U.S.C. § 626	10
29 U.S.C. § 666	10, 16
29 U.S.C. § 1131	3, 10
29 U.S.C. § 1851	10
29 U.S.C. § 1872	10
29 U.S.C. § 2617	10
30 U.S.C. § 820(d)	16
31 U.S.C. § 5322(d)	13
42 U.S.C. § 6395	10
50 U.S.C. App. § 16	10, 16

OTHER AUTHORITIES

Labor Management Racketeering Act of 1983: Hearings on S. 336 Before the Subcomm. on Labor of the Senate Comm. on Labor & Human Resources, 98th Cong., 1st Sess. (1983) 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. ———

THERMON PHILLIPS AND E.B. RICH,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioners Thermon Phillips and E.B. Rich respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *United States v. Phillips, et al.* (11th Cir. No. 90-7721).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 19 F.3d 1565, and is reproduced in Appendix A (1a-40a). The order of the Eleventh Circuit denying rehearing and denying rehearing *en banc* is reported at 33 F.3d 1384, and is reproduced in Appendix C (43a). The jury instruction of the United

States District Court for the Northern District of Alabama, Southern Division, pertinent here, is unreported and reproduced in Appendix B (41a-42a).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on May 10, 1994. A timely petition for rehearing was denied on August 9, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186, that are involved are set out in Appendix D (44a-45a).

STATEMENT OF THE CASE

A. Introduction

Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186 (hereinafter "§ 186") prohibits certain employer payments to union representatives. A criminal violation thereof requires that the Government prove that the defendant "willfully violate[d]" § 186. 29 U.S.C. § 186(d)(2). The issue here is the meaning of the statutory element "willfully violates." The trial court refused to instruct the jury that this element requires proof that the defendants knew, or were in reckless disregard of the fact, that by accepting the employer payment here (in the form of pensions) they were in violation of the substantive provisions of § 186. Instead, the court's jury instruction was that all the jury needed to find was that the defendants "knowingly and intentionally committed acts which constitute the offense charged and that such acts were not committed accidently or by some mistake"—*viz.* that the defendants knowingly and intentionally accepted the pensions. App.

42a. Based on this instruction, the jury convicted Rich and Phillips of felony violations of § 186.[1] The United States Court of Appeals for the Eleventh Circuit affirmed the convictions, upholding the validity of the trial court's instruction.[2] This *certiorari* petition seeks review by this Court of the lower court's interpretation of the phrase "willfully violates" in § 186(d)(2).

B. Statement of Facts

Petitioners Thermon Phillips and E.B. Rich were former employees of the USX Corporation who left USX in 1951 and 1964, respectively, to become union representatives employed by the United Steelworkers of America, AFL-CIO-CLC ("the Union"), the union representing USX employees. App. 4a. Until the Fall of 1984, the long-standing policy of USX had been to grant a leave of absence of up to two years for employees who left USX to become union representatives, during which time the individual on leave would continue to accrue credit under the pension plan USX maintained for its employees. *Id.*

In the Fall of 1984, USX changed its policy to allow Phillips, Rich and certain other former employees of USX who were Union representatives to receive leaves of absence for the entirety of their service with the Union,

---

[1] Jurisdiction in the district court was invoked pursuant to 29 U.S.C. § 186(e). Phillips and Rich were each convicted of one substantive violation of 29 U.S.C. § 186, and one count of conspiracy to violate § 186. Rich was acquitted of charges of mail fraud. Co-defendant USX was convicted of two substantive violations of § 186, the conspiracy count, and one criminal violation of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1131.

[2] In addition, based on the same understanding of the phrase "willfully violates," the trial court excluded substantial evidence proffered by Phillips and Rich that, if believed by the jury, would have substantiated their claim that they were unaware, and reasonably so, of the application of § 186 to the pension transaction at issue here. *See infra* at 6-7. The court of appeals also affirmed these rulings. App. 17a n.14.

with attendant pension-service credits. App. 10a-14a. Phillips and Rich, along with four other Union employees, accordingly received from USX retroactive leaves of absence for the period of their service with the Union and, with the attendant pension credits, became eligible immediately to receive pensions from USX. App. 15a. It is the receipt of those pensions that is the basis for Phillips' and Rich's criminal convictions.

The evidence at trial showed that Phillips and Rich had requested the retroactive leaves of absence and consequent pension credits during the course of collective bargaining negotiations with USX in the Fall of 1983. App. 3a. At that time, Phillips and Rich were District Director and Sub-District Director, respectively, of District 36 of the Union, and they were representing the Union in negotiations with USX aimed at achieving a collective bargaining agreement that would permit USX to re-open the Fairfield Steel Mill in Birmingham, Alabama—a facility that USX had closed over a year earlier as a result of massive monetary losses from the facility's operations. The negotiations concluded in an agreement to reopen the Fairfield facility, under terms that involved significant labor cost reductions in comparison to the agreement that had been in effect when the plant had been closed. App. 3a, 9a.

Although the issue of the pensions came up during the 1983 negotiations, the Government's theory at trial was *not* that the pensions were traded for concessions in the collective bargaining agreement or that there was any kind of *quid pro quo* for the pensions. The Government emphasized to the trial court that "[i]t is *not* the theory of the government that the pensions were given in return for any 'concessions' in the agreement"; and the Government argued to the jury that: "We're not taking the position that the pensions were promised or given in exchange for concessions in the Fairfield Works Agreement." R40-9337; *see also* Brief of Appellee United States in the Eleventh Circuit at 107. The prosecutor stated that

Phillips and Rich had "bargained hard" in the Fairfield negotiations, and that they "had no inducement not to bargain hard." R40-9338. Instead, it was the Government's position that the simple fact that Phillips and Rich received the pensions from USX constituted a criminal violation of § 186.

As of 1983 and 1984, when the conduct at issue took place, leaves of absence and pension credits such as those received by Phillips and Rich were common throughout American industry. At that time, no court or government agency had suggested, much less concluded, that such arrangements violate § 186. The then-existing authority was, in fact, to the contrary. *See Monsanto Co. v. Texas City, Texas Metal Trades Council,* Civ. No. H-78-199 (S.D. Tex. March 9, 1978) ("the Court finds and concludes that the legislative intent and judicial interpretation of Section [186] excludes, from the statutory ban on the transfer of money or other things of value from employer to employee representative, the mere acquisition of enhanced pension eligibility vested in an employee on leave of absence for purposes of conducting business on behalf of a union"); *Monsanto Co.*, 68 L.A. 101, 112 (Dworkin, 1977)("The language of [§ 186] does not prohibit an employee on leave of absence for international union business from accruing service credits for pension purposes. * * * It is inconceivable that any court of law would hold otherwise.").

The first case to rule that such pension payments can constitute a § 186 violation came long after Phillips and Rich had received their pension entitlement. *Trailways Lines, Inc. v. Trailways, Inc. Joint Council,* 785 F.2d 101 (3d Cir. 1986), *cert. denied,* 479 U.S. 932 (1986). In dissent, Judge Becker, concluding that such pension payments are covered by the exception in § 186(c)(1) for payments to a union official who is a "former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer,"

pointed out that "similar arrangements are common in collective bargaining agreements and have never before been challenged on the grounds relied upon by the majority. While this fact is certainly not dispositive of the legality of such schemes, it surely suggests that they are legal." *Id.* at 111.[3]

During the course of the trial, Phillips and Rich attempted to introduce a substantial body of evidence, much of which was excluded, to show that at the time they requested and received their retroactive leaves of absence and pensions, neither they, nor any reasonable person in their position, would have had reason to believe that such conduct was unlawful.

Phillips and Rich, and co-defendant USX, called as witnesses two former United States Secretaries of Labor, William Usery and Ray Marshall, to testify as expert witnesses. The trial court refused to allow either witness to testify as to the state of affairs in American industry at the time of the events at issue in the case. R37-7692-94 (Usery); R37-7854-58 (Marshall).

Counsel then submitted written proffers setting forth the testimony that Usery and Marshall were prepared to give. As the proffers reflect, both would have testified that grants by employers of extended leaves of absence with pension credits for union officials were exceedingly common in American industry, including the steel industry, in the years preceding 1984, and that prior to the events at issue in this case, neither the Department of Labor, the Department of Justice, nor any court, had ever suggested that such practices were illegal. Exs. Ct. 29 ¶ 23; 30 ¶ 8. According to Secretary Marshall: "[A]t the time of the operative events in this case, a union official receiving one of these leaves of absence for

---

[3] The post-*Trailways* authority is not uniform. *See Toth v. USX Corp.*, 883 F.2d 1297 (7th Cir.), *cert. denied*, 493 U.S. 994 (1989); *Communications Workers of America v. Bell Atlantic Network Serv., Inc.*, 670 F. Supp. 416, 419-20 (D.D.C. 1987).

accrual of pension credit would have been fully justified in thinking that such an accommodation was not at all unusual in the normal affairs of labor-management relations, and further, would have had no reason to believe that such a practice in any way violated the law." Ex. Ct. 30 ¶ 18.

In addition, petitioners proffered a Department of Labor report confirming that it was common for union representatives on leave of absence from a company to continue to accrue company benefits such as pensions, Ex. Def. Phillips 21 at 18, 26, and an opinion letter issued in 1977 by the Office of the Solicitor of Labor that squarely declares that § 186 does not prevent "an employee, who is on a leave of absence without pay from a company in order to serve as a union officer, from receiving retirement credit for the period during which he serves as a union official." Ex. Def. Phillips 12. The proffers were rejected by the trial court.

C. Proceedings Below

Section 186(d)(2) provides that a defendant can be criminally convicted under § 186 only if he "willfully violates" that section. Accordingly, both Phillips and Rich requested that the trial court instruct the jury that the Government was required to prove that the defendants knew, or had reckless disregard for the fact, that their actions were in violation of the substantive provisions of § 186. The trial court rejected that request and instead instructed the jury that the "willfully violates" element requires the Government only to show that the defendants "knowingly and intentionally committed acts which constitute the offense charged and that such acts were not committed accidently or by some mistake." App. 42a. As the Government put it in closing argument to the jury: "When you hear the Judge tomorrow and when you read the charge as to what 'willfully' means, basically all we have to prove is that the defendants were awake [and] * * * that it wasn't a computer error." R41-9576.

Following that instruction, the jury convicted Phillips and Rich of "willfully violat[ing]" § 186. The trial court sentenced Rich to two concurrent terms of 36 months imprisonment, three years of supervised release, and a fine of $6,000, and sentenced Phillips to two concurrent terms of 30 months imprisonment, two years of supervised release, and a fine of $6,000. R43-2934.

On appeal to the Eleventh Circuit, the convictions were upheld. As to the meaning of "willfully violates" in § 186(d)(2), the Eleventh Circuit stated:

> [A]ppellants' reading of the statute is the minority view; the Second, Third, Sixth, and Ninth Circuits all have held that the term "willfully" as used in section 186(d) requires proof only of general intent. [App. 27a (footnote omitted)].

The Eleventh Circuit reviewed the legislative history of the 1984 amendments to § 186 and found that history to be supportive of the interpretation adopted by the circuits listed in the above-quoted passage. App. 29a-37a. The Eleventh Circuit then rationalized its reading of "willfully violates" by pronouncing the conduct of Phillips and Rich to be "inherently wrong," thus implicitly answering the question that was never submitted to the jury and discrediting the evidence that the trial court had withheld from the jury as to whether that conduct, at the time it was done, was reasonably understood to be lawful:

> Neither USX nor Phillips and Rich needed to consult section 186 to determine that their actions, in paying and receiving the pensions, were illegal; they knew these acts were illegal. Section 186 codifies a basic moral tenet: an employer should not bribe a representative of his employees (or make any payments that could be perceived as a bribe), and such a representative should not accept a bribe (or any payment that could be perceived as a bribe). Appellants, of course, knew this. In enacting section 186, Congress simply prohibited people, such as Phillips

and Rich and the USX officials involved in this case, from committing acts that they should know are inherently wrong—whether or not they were aware of the text of section 186 is of no moment. [App. 36a-37a].[4]

A timely petition for rehearing and suggestion of rehearing *en banc* was denied.

REASONS FOR GRANTING THE WRIT

Introduction

Congress, in framing the provisions of the federal criminal law, has returned again and again to a particular formulation of the willfulness requirement: a defendant to be found guilty of the crime in question must be found to have "willfully violated" the statutory legal norm.[5]

---

[4] In this regard, the Eleventh Circuit repeatedly characterized the pensions as "kickbacks." We note that no such theory of wrongdoing was ever espoused by the Government or presented to the jury, and that the jury never was asked to, and did not, make any finding that the pensions were given to Phillips and Rich in exchange for concessions of any kind. See *supra* at 4-5.

[5] *See, e.g.*, the following criminal provisions: 2 U.S.C. § 437g (Disclosure of Federal Campaign Funds); 7 U.S.C. § 13 (Commodity Exchanges); 12 U.S.C. § 1957 (Banks and Banking—Financial Record Keeping); 15 U.S.C. § 77x (Securities and Trust Indentures—Domestic Securities): 15 U.S.C. § 80a (Investment Companies and Advisors); 15 U.S.C. § 717t (Natural Gas); 15 U.S.C. § 1674 (Consumer Credit Protection—Restrictions on Garnishment); 15 U.S.C. § 1717 (Commerce and Trade—Interstate Land Sales); 16 U.S.C. § 9a (National Parks—Government of Parks); 16 U.S.C. § 8250 (Public Utilities); 16 U.S.C. § 1417 (Marine Mammal Protection); 18 U.S.C. § 493 (Counterfeiting and Forgery—Bonds and Obligations); 18 U.S.C. § 597 (Elections and Political Activities); 18 U.S.C. § 799 (Espionage and Censorship—Violation of NASA Regulations); 18 U.S.C. § 843 (Importation of Explosive Materials); 18 U.S.C. § 878 (Threats and Extortion Against Foreign Officials); 18 U.S.C. § 923 (Firearms Licensing); 18 U.S.C. § 1735 (Postal Service—Sexually Oriented Advertisements); 22 U.S.C. § 618 (Registration of Foreign Propagandists); 22 U.S.C. § 2778 (Arms Export Controls); 22 U.S.C. § 3104 (International Investment and Trade in Services Survey);

The interpretation of this critical term—which sets the Government's burden in proving *mens rea*—has generated two levels of conflict and confusion in the law. At the first, and most general level, the question is whether "willfully violates" has a single settled plain meaning or a varying contextual meaning. If the latter, at the second level, the question is what is the meaning of the term in the criminal provison covering employer payments to unions and union representatives.

The decision below squarely raises both questions and urgently calls for this Court's review. The question of whether the wide array of federal statutes collected in n.5 *supra* is to be interpreted statute by statute through a close analysis of the structure and legislative history of each enactment, rather than according to the text on its face, is plainly a critical and recurring question that

---

26 U.S.C. § 7203 (Internal Revenue Code); 27 U.S.C. § 204 (Federal Alcohol Administration); 29 U.S.C. § 216 (Fair Labor Standards); 29 U.S.C. § 439 (Reporting by Labor Organizations); 29 U.S.C. § 502 (Bonding of Officers and Employees of Labor Organizations); 29 U.S.C. § 522 (Extortionate Picketing); 29 U.S.C. § 626 (Age Discrimination in Employment); 29 U.S.C. § 666 (Occupational Safety and Health); 29 U.S.C. § 1131 (Employee Retirement Income Security Program—Administration and Enforcement); 29 U.S.C. § 1851 (Migrant and Seasonal Agricultural Worker Protection); 31 U.S.C. § 5322 (Records and Reports on Monetary Instruments Transactions); 42 U.S.C. § 6395 (Energy Conservation); 50 U.S.C. App. § 16 (Trading with the Enemy).

See also, e.g., the following civil provisions: 2 U.S.C. § 179f (Library of Congress); 5 U.S.C. App. 4 (Executive Personnel Financial Disclosure Requirements); 7 U.S.C. § 21 (Registered Futures Associations); 7 U.S.C. § 25 (Commodity Exchanges—Private Rights of Action); 12 U.S.C. § 1908 (Banks and Banking—Credit Control); 12 U.S.C. § 2183 (Farm Credit System—Dissolution); 15 U.S.C. § 80b-3 (Registration of Investment Advisers); 15 U.S.C. § 2072 (Consumer Product Safety); 16 U.S.C. § 544m (National Forests); 19 U.S.C. § 81r (Foreign Trade Zones); 22 U.S.C. § 4117 (Foreign Services—Standards of Conduct for Labor Organizations); 29 U.S.C. § 1872 (Management and Seasonal Agricultural Water Protection); 29 U.S.C. § 2617 (Family and Medical Leave).

should not remain unsettled. And, the question of whether the majority rule in the courts of appeals, that "willfully violates" in § 186(d)(2) requires nothing more than a showing of general intent, is a correct reading of that provision also carries with it the most substantial consequences.

Such a reading of § 186 would subject company and union officials in the labor relations sphere to a different rule than that applied under the other statutes containing a "willful violation" requirement: in the former sphere, and only the former sphere, the Government would be required only to prove general intent—the intent showing that is required where Congress does not include a "willful violation" requirement. This important area of economic activity should be separated out for special treatment only if this Court determines that such a deviation from the standard usage of "willfully violates" is truly what Congress intended.

The court below proceeded on the premise that "willfully violates" has no plain meaning, but rather is an ambiguous term whose meaning is to be garnered from the statutory context and, most particularly, its legislative history. Starting from this premise, the court below interpreted "willfully violates this section" in § 186(d)(2) to be nothing more than a requirement that the Government prove that the defendant intended to *take the actions* specified in the substantive provisions of § 186, and not a requirement that the Government prove that the defendant intended to *violate* that legal norm.

The decision below creates the widest possible divide between the meaning of § 186(d)(2)'s "willfully violates" requirement and the uniform judicial interpretation of the same requirement in virtually all of the myriad other federal criminal statutes in which the requirement appears. The decision below, moreover, aligns the Eleventh Circuit with four other circuits—the Second, Third, Sixth, and Ninth Circuits—on this interpretation of § 186(d)(2). Only the Seventh Circuit, albeit in waver-

ing fashion, has sought to bring the interpretation of "willfully violates" in § 186(d)(2) into line with the same requirement in the other federal statutes. The fact that five circuits have so ruled accentuates the schism between the treatment of § 186(d)(2) and the treatment of the other statutes containing a "willful violation" requirement.

The approach of the court of appeals threatens to generate conflict and confusion in an area that we believe this Court should be understood to have stabilized through its decision in *Ratzlaf v. United States*, 114 S. Ct. 655 (1994). Fairly read, *Ratzlaf* stands for the proposition that the phrase "willfully violates"—or its variants, including "willfully violating," the precise phrase at issue in *Ratzlaf*—is a statutory term with a settled plain meaning in criminal law: *viz.*, that the Government "must prove that the defendant acted with knowledge that his conduct was unlawful." *Id.* at 657.[6] Indeed, as the *Ratzlaf* Court said, this settled understanding is *not* subject to variation through "resort to legislative history to cloud a statutory text that is clear." *Id.* at 662.

In contrast, the court below was of the view that *Ratzlaf* authorized it to depart from this "clear" meaning of "willfully violates." On that view, ascertaining the meaning of "willfully violates" calls for an inquiry into each provision's underlying legislative materials—an inquiry that can only unsettle what has heretofore been a quite uniform body of law.

As we develop below, this divided approach to this single term of art is contrary to the apparent sense of the term on its face and to every canon of statutory interpretation, and is, in fact, without any support in § 186's structure or in its legislative history. And, as we have noted, this divided approach puts those charged under

---

[6] In the civil context the Court has uniformly interpreted "willfully violates" as requiring proof that the defendant knew, or was in reckless disregard of the fact, that his actions were in violation of the applicable legal norm. See *infra* at 15-16.

§ 186 at far greater jeopardy than those defendants charged with "willfully violating" any of the other federal criminal provisions stating the same requirement.

1. (a) *Ratzlaf* addressed the meaning of the phrase "willfully violating this subchapter" in 31 U.S.C. § 5322 (a). That provision sets out the requirement for criminal enforcement of the statutory prohibition of "structuring" cash transactions for the purpose of evading the obligation of financial institutions to report such transactions in excess of $10,000. In *Ratzlaf*, "[t]he trial judge instructed the jury that the Government had to prove defendant's knowledge of the banks' reporting obligation and his attempt to evade that obligation, but did not have to prove defendant knew the structuring was unlawful." 114 S. Ct. at 657. This Court rejected that instruction as inadequate: "We hold that the 'willfulness' requirement mandates something more. To establish that a defendant 'willfully violat[ed]' the antistructuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." *Id.*

In reaching that result, the Court noted that the construction of "willfully violating" adopted by the lower courts in *Ratzlaf* "treated § 5322(a)'s 'willfulness' requirement essentially as surplusage—as words of no consequence." 114 S. Ct. at 659. That treatment was found wanting since, as *Potter v. United States*, 155 U.S. 438, 446 (1894), states, the "word 'willful' used to describe certain offenses but not others in the same statute 'cannot be regarded as mere surplusage; it means something.' " 114 S. Ct. at 659.

The requisite meaning, *Ratzlaf* found, is that by "subject[ing] to criminal penalties only those 'willfully violating' § 5324," Congress "signal[ed] its intent to require for conviction proof that the defendant knew not only of the bank's duty to report cash transactions in excess of $10,000, but also of his duty not to avoid triggering such a report." 114 S. Ct. at 662. Indeed,

despite "contrary indications in the statute's legislative history," the *Ratzlaf* Court declined to "resort to legislative history to cloud a statutory text that is clear." *Id.* It is also very much to the point that the *Ratzlaf* Court went on to state that had it discerned any ambiguity in the "willfully violating" requirement, the rule of lenity would dictate that the Court "resolve any doubt in favor of the defendant." *Id.* at 663 (citing *Crandon v. United States*, 494 U.S. 152, 160 (1990)).

This recognition that "willfully violating" is a criminal law term of art of unclouded clarity came after the *Ratzlaf* Court had given explicit recognition to the oft-quoted admonition that " '[w]illful,' . . . is a 'word of many meanings,' and 'its construction [is] often . . . influenced by its context.' " 114 S. Ct. at 659 (brackets around "is" in original) (quoting *Spies v. United States*, 317 U.S. 492, 497 (1943)). While the Court's explanation of why the "statutory text" in *Ratzlaf* was nevertheless so "clear" may be cryptic, we submit that the explanation lies in the fact that what was required by the statute there, as here, is proof of a willful *violation, not* the simple proof of a willful *act*.[7]

Particularly against the background provided by the numerous criminal law provisions that are phrased in terms of requiring proof of a willful action, the formulation "willfully violates" carries with it the strongest indication that the legislature intends that the Government prove that the defendant was aware of the legal norm and of his violation of that norm. It stretches language well past

---

[7] *Cf. Browder v. United States*, 312 U.S. 335 (1941), cited by the court below for the proposition that "willfully" sometimes can is construed to require only "general intent." App. 24a. The statute in *Browder* did *not* contain a requirement that a defendant must be found to have "willfully *violated*" the statute; it simply required that a *certain action* (the use of a passport secured by the making of a false statement) must have been willfully undertaken. 312 U.S. at 341.

the breaking point to state that one can "willfully violate" a legal norm without knowing of the norm, much less without knowing that his conduct violates that norm.

(b) A "willful violation" requirement is found in a myriad of federal criminal and civil statutes. *See* n.5 *supra*. Invariably—as here and in *Ratzlaf*—the requirement serves to distinguish between a simple violation of a regulatory norm, which is subject to a base level penalty or remedy, and a more serious violation, which is subject to an enhanced penalty or remedy.

Ratzlaf reconfirms this Court's consistent interpretation of the "willful violation" requirement. In the criminal cases prior to *Ratzlaf*, this Court held that to prove a willful violation the Government must prove that the defendant acted with a consciousness of the illegality of his conduct. *See Spurr v. United States*, 174 U.S. 728, 734 (1899) (a "willful violation"—and therefore a criminal violation—of statute prohibiting unlawful certification of a check requires something more than a violation of the statute's prohibition "without any purpose to evade or disobey the mandates of the law"); *Potter v. United States*, 155 U.S. at 445-46 (a willful violation "implies on the part of the [defendant] knowledge and purpose to do wrong").

Similarly, in the civil context, the Court has invariably held that the "willful violation" requirement necessitates proof that the defendant acted with an awareness, or, at the least, acted in reckless disregard of the fact, that his conduct was in violation of the applicable legal norm. *See Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1708 (1993) (a "willful violation" under "two-tiered liability scheme" of Age Discrimination Employment Act requires "knowledge or reckless disregard" of the law); *TWA v. Thurston*, 469 U.S. 111, 127-28 (1985) (same); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132-33 (1988) (a "willful violation" under Fair Labor Standards Act justifying three year statute of limitations requires showing that "employer either knew or showed

reckless disregard for the matter of whether its conduct was prohibited by the statute").

By the same token, the case law in the lower federal courts on the "willful violation" requirement in other federal statutes requires proof that the defendant was aware, or, at the least, in reckless disregard of the fact, that his actions were in violation of the applicable legal norm. Virtually every federal statute containing a "willful violation" requirement other than § 186(d)(2), then, has been interpreted to have just the meaning that the court below rejected.[8]

---

[8] *See, e.g.*, 22 U.S.C. § 2778(c)—Arms Export Control—*United States v. Golitschek*, 808 F.2d 195, 203 (2d Cir. 1986) (requires knowledge of legal obligation prohibiting defendant's conduct); *United States v. Davis*, 583 F.2d 190, 193 (5th Cir. 1978) (requires proof that defendant knowingly and intentionally violated known legal duty); 30 U.S.C. § 820(d)—Mine Safety—*United States v. Consolidation Coal Co.*, 504 F.2d 1330, 1335 (6th Cir. 1974) (requires determination that defendant intentionally disobeyed safety standard or recklessly disregarded its requirements); *United States v. Jones*, 735 F.2d 785 & n.6 (4th Cir.) (same), *cert. denied*, 469 U.S. 918 (1984); 50 U.S.C. App. § 16(a) (West Supp. 1994)—Trading with the Enemy—*United States v. Macko*, 994 F.2d 1526, 1532-33 (11th Cir. 1993) (requires proof that defendants knew actions were unlawful); *United States v. Tooker*, 957 F.2d 1209 (5th Cir.) (same), *cert. denied*, 113 S. Ct. 187 (1992); 2 U.S.C. § 437(d)(1)(A)—Federal Election Campaign—*AFL-CIO v. Federal Election Comm.*, 628 F.2d 97, 100-02 (D.C. Cir. 1980) (requires knowledge that challenged action was unlawful), *cert. denied*, 449 U.S. 982 (1980); 29 U.S.C. § 666(a)—OSHA—*Brock v. Morello Bros. Construction, Inc.*, 809 F.2d 161, 163-65 (1st Cir. 1987) (requires some form of awareness, not simply of forbidden conduct, but also of statute that forbids it); *Babcock & Wilcox Co. v. OSHRC*, 622 F.2d 1160, 1165-68 (3d Cir. 1980) (requires defiance or such reckless disregard of an action's consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act); *St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840, 846 (8th Cir. 1981) (act done voluntarily with either intentional disregard of or plain indifference to Act's requirements); 18 U.S.C. § 923(d)(1)(C)—Firearms—*Perri v. BATF*, 637 F.2d 1332, 1334 (9th Cir. 1981) (license denial requires proof that applicant knowingly failed to follow or was indifferent to his legal obligations); *Lewin v. Blumenthal*, 590 F.2d 268 (8th Cir. 1979) (same); *but see Stein's,*

(c) The plain meaning analysis of the "willful violation" requirement that is crystallized in *Ratzlaf* would appear to control this case. Section 186 prohibits certain transfers of "thing[s] of value" from employers to unions or union representatives. Subsections (a), (b), and (c) of § 186 delineate the types of conduct that are prohibited by that section. But such prohibited conduct does not, by itself, constitute a criminal violation of § 186. Rather, the prohibited conduct *simpliciter* is subject only to civil injunctive relief, § 186(e).

Subsection (d), in its turn, defines when such conduct is criminal. Subsection (d)(2)—the part of subsection (d) that is applicable to this case—requires proof of an element *additional* to the elements sufficient to establish a violation of the substantive portions of § 186: the defendant must be shown to have "willfully violate[d]

Inc. v. Blumenthal, 649 F.2d 463, 467 (7th Cir. 1980) (license denial affirmed when applicant had violated record-keeping requirements of act despite repeated warnings from BATF); 27 U.S.C. § 204(e)—Liquor Licensing—*Fedway Assocs., Inc. v. BATF*, 976 F.2d 1416, 1424-25 (D.C. Cir. 1992) (license suspension improper when defendant reasonably believed challenged actions were lawful).

The one statute of which we are aware that has been construed as deviating from this understanding of "willfully violates" is § 32(a) of the Securities and Exchange Act, 15 U.S.C. § 78ff(a). Because, *inter alia*, that section contains a proviso stating that proof that the defendant "had no knowledge of [the] rule or regulation" he violated is a defense only to imprisonment and not to a fine, the Second Circuit has held that fines may be imposed without proof of the defendant's awareness of the legal norm he violated. *United States v. Dixon*, 536 F.2d 1388, 1395, 1397 (2d Cir. 1976). The Second Circuit has acknowledged that, as so construed, in § 32(a) "'willful' has less than its ordinary significance." *Id.* at 1397. "[S]ince the term must have some meaning," *id.* at 1395, the Second Circuit has construed the willfulness requirement in § 32(a) to require proof that the defendant "realiz[ed]] . . . he was doing a wrongful act," *id.*, *viz.*, that he "had *some* evil purpose," *id.* at 1397.

this section." The office of that requirement is to separate violations of § 186 that are merely civil in nature from those that are criminal in nature.

Under the court of appeals' reading, "willfully violates" is nothing more than a general intent requirement—*viz.*, a requirement that the Government prove that the defendant intended to do the *acts* that constitute the offense. But, even in the absence of an express *mens rea* requirement, criminal statutes are presumed to require proof of general intent. *See, e.g., Staples v. United States*, 114 S. Ct. 1793, 1797-98 & n.3 (1994). Thus, the court of appeals' interpretation leaves § 186(d)(2) with precisely the meaning the provision would have if it did not contain a "willfully violates" requirement. The court below, in other words, treated the explicit inclusion of that requirement as "surplusage—as words of no consequence." *Cf., Ratzlaf*, 114 S. Ct. at 659.

(d) The court of appeals did not come to grips with those portions of *Ratzlaf* that directly apply here. That court did not acknowledge that the *Ratzlaf* Court had found the statutory words "willfully violating" to be so "clear" as to preclude "resort to legislative history." 114 S. Ct. at 662. Rather, the court quoted the reference in *Ratzlaf* to "willful," standing alone, having many meanings and then ignored the reasoning and holding of the decision regarding the single, plain meaning of "willfully violating." The court of appeals compounded its error by misquoting a passage from this Court's decision in *Cheek v. United States*, 498 U.S. 192, 200 (1991), to suggest that the " 'traditional rule' is that 'willfully' requires a finding of only general intent." App. 24a.[9]

---

[9] The court below went on to indicate that *Cheek* recognized an exception to that "traditional rule" when "willfully" is used in the federal tax statutes. *Id.* In fact, the "traditional rule" referred to in *Cheek* was "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution." 498 U.S. at 199. The *Cheek* Court's point was that " 'willfully' as

On that doubly flawed basis, the court of appeals treated "willfully violates" as an ambiguous phrase and embarked on precisely the mode of interpreting such phrases that the *Ratzlaf* Court rejected as improper with respect to the phrase "willfully violating." In so doing, the court of appeals redoubled its errors.

First, the court below asserted that to interpret the "willfully violates" language of subsection (d)(2) to require knowledge that the conduct violates the law would render superfluous a specific intent requirement in the companion subsection (d)(1). In 1984, Congress split § 186(d) into its present two subsections, retaining the "willfully violates" language in both subsections, but adding in subsection (d)(1) an additional intent requirement applicable solely to cases implicating the exceptions stated in § 186(c)(4)-(9). Thus, in addition to the "willfully violates" requirement, subsection (d)(1) also requires proof that the defendant committed the violation "with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment." The court below reasoned that:

> Congress had to have intended the term "willfully" as used in both sections 186(d)(1) and (d)(2) to require a finding of general intent; otherwise, the "intent to benefit" language in section 186(c)(1) would be superfluous, because a person who had the specific intent to violate [§ 186] would also necessarily intend to benefit himself or to influence a union official. [App. 31a-32a].

That "reasoning" is specious. Subsections (c)(4)-(9) of § 186—the provisions that trigger application of the criminal sanctions in subsection (d)(1), as opposed to those in subsection (d)(2)—establish numerous detailed requirements applicable to joint labor-management trust funds and to the check-off of union dues. An employer

---

used in the federal criminal tax statutes [carves] out an exception to [*that*] traditional rule." *Id.* at 200.

and union may violate these requirements willfully—that is, with knowledge that the technical requirements of subsection (c) have not been satisfied—without having any intent to confer an improper benefit on anyone.[10]

Second, the court below stated:

> When Congress amended section 186(d) in 1984, it made no attempt to change the clear majority rule that "willfully" required a finding of only general intent. Because Congress left the willfulness requirement of former section 186(d) unchanged when it created section 186(d)(2) in 1984, we can only assume that Congress intended "willfully" to require a finding of only general intent. Congress is presumed to be knowledgeable about existing case law pertinent to any legislation it enacts, . . . and about the basic rules of statutory construction. [App. 34a-35a (citations and footnote omitted)].

But, there is nothing in the legislative history of the 1984 amendments to subsection (d) indicating that any of the *lower-court* rulings on "willfully violates" were brought to the attention of Congress.[11] "[I]n the absence of anything in the legislative history indicating that they were called to its attention, we should not assume that

---

[10] For example, § 186(c)(5)(B) requires, *inter alia*, that "employees and employers [be] equally represented in the administration" of a qualified trust fund, and that the fund's annual audit be made available for inspection at the principal office of the fund. Employers and unions could "willfully" violate these requirements by establishing an unevenly-divided group of trustees or by not producing an annual audit (despite knowledge of these statutory requirements), without intending or realizing any improper benefit.

[11] The only discussion of "willfully violates" reflected in the 1984 legislative history is in the *Labor Management Racketeering Act of 1983: Hearings on S. 336 Before the Subcomm. on Labor of the Senate Comm. on Labor & Human Resources*, 98th Cong., 1st Sess. 148, 150 (1983) (Justice Department assured the Senate that "[a] 'willful' violation, especially when used in connection with crimes punished as felonies, ordinarily connotes a voluntary, intentional violation of a known legal duty").

Congress was aware of them." *Yates v. United States*, 354 U.S. 298, 310 (1957).[12] Indeed, even where, unlike here, Congress is aware of particular lower-court statutory interpretations, a failure to address those lower-court cases does not imply congressional acceptance of those rulings. *See, e.g., McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 130-31 & n.1, 132 n.8 (1988).

Finally, the court of appeals' characterization of the conduct here as "inherently wrong" (App. 36a)—like the Government's similar characterization in *Ratzlaf*, 114 S. Ct. at 660-62—cannot provide a basis for interpreting the "willfully violates" requirement in subsection (d)(2) as nothing more than a general intent requirement.

Whether the conduct of Phillips and Rich was in violation of § 186 turns on the interpretation of the exception to the prohibitions of § 186 that is stated in subsection (c)(1), covering payments by an employer "to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer." As we have shown, *supra* at 5-7, as of the time of the events in this case, it was widely understood that a pension credit arrangement such as that here is within the subsection (c)(1) exception. And, Phillips and Rich were not accused of providing any *quid pro quo* to USX in exchange for their pension credits. *See supra* at 4-5. Thus, the Eleventh Circuit's

---

[12] *Accord Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439, 1452-53, 1458-59 & n.8 (1994); *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 615 (1981); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 336 n.7 (1971); *United States v. Powell*, 379 U.S. 48, 55 n.13 (1964). *See also, e.g., Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 241-42 (1970) (concerning Supreme Court statutory interpretations); *Girouard v. United States*, 328 U.S. 61, 69-70 (1946) (same); *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 139-40 n.10 (1941) (same); *Helvering* v. *Hallock*, 309 U.S. 106, 119-21 & n.7 (1940) (same).

"inherent[] wrong" characterization is a mischaracterization of the facts of this case.

Equally to the point, even on the court of appeals' reading of § 186(d)(2), the "willfully violates" requirement does not change from *case to case*. The question is what that requirement means in the range of cases covered by subsection (d)(2). That range includes cases that depend on close interpretation of the scope of the exceptions in subsection (c)(1), (2) and (3). Thus, not every act that may violate § 186 can be classified as "inherently wrong." Indeed, there would have been no reason for Congress to adopt the "willfully violates" requirement if Congress believed that all conduct in violation of § 186 is "inherently wrong." *See supra* at 18.

* * * *

In sum, the court below provided no basis for rejecting *Ratzlaf's* analytic approach or for interpreting the "willfully violates" language of § 186(d)(2) to mean something different from the "willfully violating" language in *Ratzlaf* and in the lower court cases cited *supra* at 16-17 n.8. The question thus raised as to whether "willfully violates" is a term of art with a uniform plain meaning is one with the widest ramifications that should be resolved by this Court.

2. The court of appeal's departure from *Ratzlaf* is also, as we have shown, a departure from the mai tream of cases interpreting the "willful violation" concept in the broad range of federal statutes employing that concept. That interpretive gulf is accentuated by the fact that the court below is not alone in giving this idiosyncratic meaning to the "willfully violates" requirement of § 186(d)(2). The Eleventh Circuit, through its decision here, joins four other circuits—the Second, Third, Sixth and Ninth Circuits—in so interpreting § 186(d)(2). The first in this line of cases, *United States v. Carter*, 311 F.2d 934, 943 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963), succinctly summarizes the position adopted by the entire

line: "The word 'willful' even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." *See also United States v. Overton*, 470 F.2d, 761, 767 (2d Cir. 1972), *cert. denied*, 411 U.S. 909 (1973); *United States v. Ricciardi*, 357 F.2d 91, 100 (2d Cir.), *cert. denied*, 384 U.S. 942 (1966); *United States v. Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973); *United States v. Lanni*, 466 F.2d 1102, 1110 (3d Cir. 1972); *United States v. Bloch*, 696 F.2d 1213, 1216 (9th Cir. 1982).[13]

The Seventh Circuit, however, albeit in a wavering and uncertain fashion, has been the only circuit to resist this

---

[13] This line of cases developed out of a statement in *United States v. Ryan*, 350 U.S. 299, 305 (1956), in which the Court referred, in passing, to § 186(d) as "a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative." The only issue in *Ryan* was the definition of "union representative" in §§ 186(a), (b) and (c). The Court had no occasion to, and did not, address the meaning of the "willfully violates" requirement in subsection (d). Nor, of course, does classifying a crime as *"malum prohibitum"* settle the question as to the crime's *mens rea* requirement; the requisite state of mind in a *malum prohibitum* crime is established by the legislature that determines the elements of the crime.

Nevertheless, the Second Circuit in *Ricciardi*, 357 F.2d at 100, and the Third Circuit in *Lanni*, 466 F.2d at 1110, relied on the *Ryan dictum* as the basis for concluding that "willfully violates" in § 186(d) is simply a general intent requirement. And the Sixth Circuit in *Carter*, 311 F.2d at 943, relied on the Second Circuit's decision on remand in *Ryan*, approving, based on the *Ryan dictum*, a general intent instruction as satisfying the "willfully violates" element of § 186(d). *United States v. Ryan*, 232 F.2d 481, 483 (2d Cir. 1956) (*per curiam*). Later cases in the Second, Third, and Ninth Circuits simply followed the rationale set down in *Ricciardi*, *Lanni*, and *Carter*. *See Overton*, 470 F.2d at 767 (following *Ricciardi*); *Pecora*, 484 F.2d at 1294 (following *Lanni*); *Bloch*, 696 F.2d 1213 (following *Carter*).

So as not to be misunderstood, we add that the court below—in contrast to the Second, Third, Sixth and Ninth Circuits—did not rest its decision on the *Ryan dictum*. See App. 28a.

trend. *United States v. Incisco*, 292 F.2d 374, 380 (7th Cir.), *cert. denied*, 368 U.S. 920 (1961) ("We hold that the term 'wilfully violates' in Section 186(d) contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section."). *Inciso* was recently reaffirmed in *United States v. Papia*, 910 F.2d 1357, 1362 (7th Cir. 1990) ("[t]his circuit's formulation requir[es] an awareness of or reckless disregard for § 186(d)'s restrictions," citing *Inciso*). In two cases between *Inciso* and *Papia*, however, the Seventh Circuit quoted the standard of *Inciso* and purported to follow that standard, but approved trial court jury instructions that did not in fact satisfy the *Inciso* standard. *United States v. Kaye*, 556 F.2d 855, 863 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977); *United States v. Keegan*, 331 F.2d 257, 262 (7th Cir.), *cert. denied*, 368 U.S. 920 (1964).

The most straight forward comparison of the opinion in *Carter*, 311 F.2d at 943, and this Court's opinion in *Ratzlaf* (discussed *supra* at 13-15) demonstrates that the majority court of appeals' rule on "willfully violates" in § 186(d)(2) is 180 degrees removed from this Court's general plain meaning interpretation of the phrase. And, as we have shown, *supra* at 18-23, the various rationales for the lower court majority rule on § 186(d)(2) cannot withstand a moment's reasoned scrutiny.

Given the breadth of application of § 186(d)(2) and its importance in the federal scheme for regulating labor-management relations, this anomalous reading of § 186 (d)(2), standing alone, requires this Court's consideration.

CONCLUSION

For the reasons stated above, this Court should grant this petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

LAURENCE GOLD *
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
* Counsel of Record

ALBERT C. BOWEN
BEDDOW, ERBEN & BOWEN
2019 Third Avenue North
Birmingham, AL 35203

J. MARK WHITE
WHITE, DUNN & BOOKER
1200 First Alabama Bank Bldg.
Birmingham, AL 35203
Counsel for Petitioners

Supreme Court, U.S.
FILED
NOV 7 1994

No. 94 831

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

THERMON PHILLIPS AND E.B. RICH,
Petitioners,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

LAURENCE GOLD *
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
* Counsel of Record

ALBERT C. BOWEN
BEDDOW, ERBEN & BOWEN
2019 Third Avenue North
Birmingham, AL 35203

J. MARK WHITE
WHITE, DUNN & BOOKER
1200 First Alabama Bank Bldg.
Birmingham, AL 35203
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

		Page
A.	Opinion of the United States Court of Appeals for the Eleventh Circuit	1a
B.	Excerpt, Jury Instruction in the United States District Court for the Northern District of Alabama, Southern Division, June 20, 1990	41a
C.	Order of the United States Court of Appeals for the Eleventh Circuit, denying rehearing *en banc*	43a
D.	Text of Relevant Statutory Provisions, Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 141 et seq.	44a

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 90-7721

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

THERMON PHILLIPS, E.B. RICH, USX CORPORATION
a/k/a UNITED STATES STEEL CORPORATION,
Defendants-Appellants.

Appeal from the United States District Court
Northern District of Alabama

May 10, 1994

Before TJOFLAT, Chief Judge, COX, Circuit Judge, and FAY, Senior Circuit Judge.

TJOFLAT, Chief Judge:

This case involves a steel producer's payment of kickbacks, in the form of illegal pension payments, to union officials, in violation of the Labor Management Relations ("Taft-Hartley") Act § 302, 29 U.S.C. § 186 (1988), and its failure to notify the employee pension plan's participants that the plan had been amended to provide for such payments, as required by the Employee Retirement

Income Security Act ("ERISA") §§ 101, 102, 104, 29 U.S.C. §§ 1021, 1022, 1024 (1988). A jury found that the steel producer and the union officials, by arranging for the pension payments, violated the Taft-Hartley Act, and it convicted them under the Act's criminal enforcement provisions, 29 U.S.C. § 186(d). In addition, the jury found the steel producer guilty under ERISA's criminal enforcement provision, 29 U.S.C. § 1131 (1988), for failing to notify the pension plan's participants of the change in their pension plan. Finally, the jury found that the steel producer, by making the kickbacks, had engaged in a scheme to defraud the pension plan's beneficiaries in violation of the mail fraud statute, 18 U.S.C. § 1341 (1988).

The steel producer and the union officials, contending on several grounds that the trial court denied them a fair trial, and, in the case of the union officials, appropriate sentences, ask us to set aside the district court's judgment and order a new trial. We find their contentions meritless, and accordingly affirm their convictions and the union officials' sentences.

I.

The steel producer in this case is the USX Corporation ("USX"). Headquartered in Pittsburgh, Pennsylvania, USX is a major steel manufacturer; it owns and operates a number of steel mills throughout the United States. The steel workers in these mills are represented by the United Steelworkers of America, International Union ("Union"), which also is headquartered in Pittsburgh, Pennsylvania. A prime, or "basic," collective bargaining agreement, negotiated by USX and the Union's principal officers every three years, governs, among other things, the rates of pay (including pensions) of these workers.[1] "Local" collective

[1] The Union negotiates a basic collective bargaining agreement with each major steel producer in the United States, including USX; customarily it negotiates with all of the steel producers at the same time. The basic agreements, however, may differ from one company to another.

bargaining agreements (between USX and the Union's locals), which are negotiated after the basic agreement is reached, cover working conditions such as crew sizes, shift times, and craft assignments, at specific steel mills. These local agreements are negotiated by the Union's district directors and sub-district directors responsible for the Union's district in which the steel mill is located.

The plan that led to the kickbacks in this case evolved during the negotiation of a local agreement between USX and the ten locals at USX's Fairfield Steel Mill ("Fairfield") in Birmingham, Alabama. The negotiations began in September 1983, six months after USX and the Union had reached a basic agreement. At the time, the steel market was depressed and many of USX's mills were idle, including Fairfield. USX was not willing to resume production at these mills unless the locals agreed to a permanent reduction in the labor force, the elimination of "incentive" pay, and the discontinuation of certain restrictive work practices.

Fairfield was located in the Union's District 36.[2] Thermon Phillips and E.B. Rich, the Union officials convicted in this case, were District Director and Sub-District Director, respectively, of District 36; accordingly, the Union assigned them to negotiate the local agreement for the Fairfield steelworkers. William Miller, USX Vice President for Labor Relations, was the USX officer who met with Phillips and Rich and signed, for USX, the local agreement they eventually reached. Miller acted under the direction of J. Bruce Johnston, USX Executive Vice President for Employee Relations. Johnston, in turn, reported to David Roderick, the Chief Executive Officer and Chairman of the Board of Directors of USX.

Phillips and Rich were full time Union employees; the Union paid their salaries and provided their fringe benefits.

---

[2] District 36 covers Alabama, Florida, Louisiana, Mississippi, Puerto Rico, and the Virgin Islands.

Years earlier, Phillips and Rich had worked for USX: Phillips from 1948 to 1951 and Rich from 1949 to 1964. At the time they left USX's employment, the basic agreement provided that a worker who wanted to leave USX to become a Union employee, such as a district or subdistrict director, could request USX to grant him a one-year "leave of absence." If USX granted the leave, the worker would continue to accrue, for pension purposes, "continuous service" for one year; if requested, USX could extend the leave for one additional year. USX could not extend a worker's leave of absence beyond that, however, because the basic agreement contained a provision limiting a leave of absence to two consecutive years.[3] In order to prevent a break in his continuous service, and thus to save his pension, a worker who had left USX to accept Union employment had to return to USX before his leave of absence expired.

Neither Phillips nor Rich returned to USX after leaving its employment in 1951 and 1964, respectively; therefore, at the time they began negotiating the local agreement for the locals at Fairfield in 1983, they had lost whatever right they may have had to receive a USX pension. None-

---

[3] The leave of absence provision as contained in the 1983 basic agreement read as follows:

> J. *Leaves of Absence for Employees Who Accept Positions with the . . . Union*[]
>
> Leaves of absence for the purpose of accepting positions with the . . . Union[] shall be available to a reasonable number of employees. . . .
>
> Leaves of absence shall be for a period not in excess of one year and may be renewed for a further period of one year.
>
> Continuous service shall not be broken by the leave of absence but will continue to accrue.

Not all steel producers limited leaves of absence to two years in their basic agreements; some granted indefinite leaves of absence to workers who accepted full-time positions with the Union. Thus, if a worker left such a company to work for the Union, he continued indefinitely to accrue "continuous service" for pension purposes.

theless, Phillips and Rich decided to condition the local agreement they were negotiating, and thus the resumption of production at Fairfield, on USX's willingness to award them enough "continuous service" to entitle them immediately to retire from USX's employment and receive a pension. They also decided to demand similar treatment for six members of Phillips' staff and Bruce Thrasher, the Union's District Director of District 35, all of whom were full-time Union employees and ineligible for a USX pension.[4]

The negotiations over a new local agreement for Fairfield lasted approximately four months and involved several meetings. At the first meeting, Phillips and Rich told Miller that the Union could no longer abide the provision of the basic agreement that limited a leave of absence to two years; the Union wanted the provision amended to authorize the granting of an unlimited leave of absence for those who wished to leave USX to accept Union employment. Miller told Phillips and Rich that USX would not agree to such an amendment, and they did not pursue the matter.

Amending the basic agreement to remove the two-year limitation on leaves of absence would not have entitled Phillips and Rich to receive pensions from USX, because the proposed amendment would apply only to current USX employees, not to former employees who had severed all ties with the company. Whether or not Phillips and Rich were aware of this fact, they subsequently made their intentions clear when, following their second meeting with Miller, Rich took him aside, said "you accommodate us and we'll accommodate you," handed him a piece of paper,

---

[4] All seven had worked for USX before becoming full-time employees of the Union, but all had been gone from USX for more than two years. Consequently, like Phillips and Rich, none of the seven was eligible for a pension.

and told him to "take care" of the matter. The piece of paper read as follows:

> The persons whose names are listed below were active employees of [USX] until they were granted a leave of absence for a specified period of time. They are:
>
> *PHILLIPS, Thermon*
> THRASHER, Bruce
> WILLIAMS, Jimmie Lee
> GURLEY, Ralph T.
> *RICH, E.B.*
> STATUM, Carl
> PEARSON, Virgil L.
> SHEPHERD, Fred A.
> NEWELL, David L.
>
> Those leaves of absence are hereby extended for an indefinite period of time until such person dies or takes pension. Those listed employees will accrue continuous service for pension purposes only. Upon such time as the employee applies for pension, their pension will be calculated as if they had worked during the leave of absence (excluding percentage formula). The type and amount of pension will be governed by the [basic agreement] in effect at the time the employee applies for pension.

(Emphasis added) (social security number omitted). If USX agreed, Phillips and Rich (along with the others listed on the paper) would receive pensions with monthly payments of hundreds of dollars and present values of over $80,000. Miller sent the piece of paper to Johnston, who, after consulting Roderick, instructed Miller to reject Phillips' and Rich's request.

Following a meeting in October 1983, Phillips and Rich told Miller that there would be no local agreement at Fairfield until USX authorized the pensions. Miller

responded that the company knew of no way that the pensions could be paid. Negotiations on other issues continued.

While Miller and Phillips and Rich were negotiating a local agreement for Fairfield, USX also was negotiating local agreements with several of the Union's other district directors. In each case, USX demanded concessions similar to those being demanded from Phillips and Rich. The Union refused to grant the concessions, and by mid-November all negotiations ceased. Nevertheless, Miller continued to communicate with Phillips and Rich. On December 23, 1983, Miller met with Johnston and Roderick to review the situation at Fairfield; he told them that one of the items still "on the table" was the matter of pensions for Phillips and Rich and the seven other Union officials on their list. Johnston instructed Miller to reopen the negotiations, in a last-ditch attempt to reach an agreement before the end of the year.

On the morning of December 24, Miller met with Phillips and Rich in Birmingham, and they reached an agreement and reduced it to writing. Phillips refused to sign the agreement, however, because USX had not agreed to authorize pensions for them and the other Union officials on their list. Miller immediately called Pittsburgh and reported this to Johnston, who had anticipated Phillips' refusal and was ready with an answer. He instructed Miller to tell Phillips and Rich that USX would consider their request for retroactive leaves of absence, and the "continuous service" it would bring, on the following conditions:

First, because the basic agreement's leave of absence limitation could not be amended by a local agreement, the basic agreement would have to be amended. Moreover, the Union would have to take the initiative and seek the amendment in separate negotiations between its officers in Pittsburgh and USX.

Second, USX would grant retroactive leaves of absence only to those Union officials who had left USX to work for the Union in or before November 1979.[5]

Third, the resulting continuous service would qualify these Union officials for certain types of pensions only.[6]

Fourth, USX would consider pensions only for those who had gone directly from employment with USX to employment with the Union and had continuously serviced a USX steel mill thereafter.

Fifth, USX would consider pensions only for those who had worked for USX steel-producing facilities still in operation.

Sixth, USX would consider pensions only for those who were presently active Union officials.

Seventh, USX would make the pensions effective March 1, 1984.

Finally, Bruce Thrasher would not receive a pension under any circumstances.[7]

As soon as his conversation with Johnston ended, Miller relayed these terms to Phillips and Rich, who in turn asked Miller whether he believed USX would actually grant the pensions. Miller replied that USX would favorably consider the matter. With this assurance, Phillips signed the local agreement (the "Fairfield Agreement").[8] The Fair-

---

[5] Of the Union officials on Phillips' and Rich's list, the last one to leave USX to work for the Union left in November 1979.

[6] The types of pensions available at that time to USX steel workers is not pertinent here, and will receive no further comment.

[7] Testimony at trial indicated that Johnston abhorred Thrasher.

[8] Soon after the Fairfield Agreement was signed, James Short, USX Vice President of Benefits, who also served as Vice President of the corporation administering USX's pension fund, the United States Steel and Carnegie Pension Fund, Inc., returned from a vacation and learned of the Fairfield Agreement. In particular, he

field Agreement called for a reduction in both the work force at the mill and the incentive pay of its workers, as well as the elimination of most of the restrictive work practices; USX projected a savings in labor costs of over $24 million per year and consequently resumed steel production at Fairfield.[9]

In July 1984, several workers at Fairfield filed grievances against USX calling the interpretation of the Fairfield Agreement into question. Phillips and Rich, as part of their duties as district director and sub-district director, were responsible for determining whether the locals (to which the workers belonged) would prosecute the grievances, and, if the grievances were not resolved, whether to demand arbitration. When Johnston learned of these grievances, and the contract interpretation dispute, he asked Miller whether "we are in jeopardy of losing our momentum with [Phillips and Rich]." Miller replied: "[T]he thing they have their eye on, and the thing that will affect this relationship, will be how we respond [to their request for pensions]." Johnston instructed Miller to tell Phillips and Rich that their pensions would be granted. Miller did so, and the grievances were withdrawn.

At this point, Johnston drafted an amendment to the basic agreement's leave of absence provision for submission to the Union. He did not submit the document to the Union, however, because he had been informed that

---

learned that, under the agreement, the labor force at Fairfield had been reduced by 1,300 workers, all of whom had received "early retirement," and that USX was considering granting pensions to certain Union officials who were ineligible for USX pensions. As he believed it might be unlawful for USX to award such pensions, he asked USX's legal department to look into the matter. The record does not indicate what advice the legal department may have given Short.

[9] As USX had failed to get similar concessions from workers at other idle plants where concessions negotiations had taken place, USX permanently closed those plants within a few days.

the amendment, if adopted, might work to the detriment of Phillips and Rich; the Union members at Fairfield might learn of it and conclude that Phillips and Rich had betrayed them by granting several concessions in the Fairfield Agreement in exchange for a pension. In an effort to avoid this perception, Johnston abandoned his plan to have the basic agreement amended; instead, he decided to use USX's Corporate Policy Committee, on which he and Roderick served, as the vehicle for authorizing the pensions Phillips and Rich were demanding.

On October 22, 1984, Johnston submitted to the Committee a two-part proposal, which was adopted the same day.[10] First, Johnston proposed that the Committee amend the USX Personnel Manual, which informed USX's personnel decisions, to allow the Committee to grant leaves of absence to workers who left USX's employment to work for the Union for periods in excess of two years. The Personnel Manual, as then written, stated as follows:

> LEAVES OF ABSENCE
>
> 2. *Reasons for Granting Leaves of Absence*
>
> a. A leave of absence should be granted . . . for such reasons as death or illness in *the employee's* immediate family, for further education of *employees* . . . and for such other reasons as may appear proper *to the supervisor authorized to grant such leave.* [The remainder of the paragraph makes it clear that leave under this paragraph applies to current employees.]
>
> b. Leaves of absence will not be authorized to *enable employees to take other jobs.* . . . [This paragraph also applies to current employees.]

[10] **The Committee adopted the proposals perfunctorily, because it considered Johnston, an established labor relations expert, to be the last word on the matter.**

> c. The formal leave of absence procedure is not followed in the case of *an employee who is sick or otherwise physically disabled.* [This paragraph also applies to current employees.]
>
> d. Leaves of absence for the purpose of accepting positions with the international or local unions shall be available to a reasonable number of *employees* provided adequate notice of intent [on the part of the employee] to apply for leave is given to plant management to enable proper provisions for *filling the job to be vacated* and provided such leave is approved in advance by the office of the Vice President—Labor Relations, Pittsburgh. Such leaves of absence shall not break continuous service and shall be for not more than one year and may be renewed for a further period of one year at the discretion of the company.

(Emphasis added.) Johnston proposed that the Personnel Manual be amended by placing the following language after the word "company" at the end of subparagraph d: "except as the Corporate Policy Committee approves the granting of a leave of absence for a longer period of time." The addition of this language did not change the obvious fact that subparagraph d applied to *current employees* who wished to take a leave of absence to work for the Union. The first proposal did not provide pensions for Phillips, Rich, and their colleagues, because they were not current USX employees; rather, it was designed to enhance USX's relationship with the Union by relaxing USX's leave of absence policy to permit indefinite leaves.

Second, Johnston proposed that the Committee grant retroactive leaves of absence to *former employees who* had left USX's employ to work for the Union and, *having exhausted their leaves of absence* (which were limited to a total of two years), *had lost any right they may have*

had to a USX pension. Johnston expressed this part of his proposal to the Committee in the following language:

> Grant leaves of absence to former employees who meet the conditions specified below:
>
> A leave of absence shall be granted for the period between the date on which *the employee left active employment with United States Steel Corporation* [USX] and the earlier of (i) the date of retirement from [USX], or (ii) the date employment with the [Union] terminates, with the proviso that such leave of absence which is creditable as continuous service shall be used for the purpose of determining eligibility for any type of pension under the 1980 Non-Contributory Pension Rules and any successor thereto other than a 30 year, 60/15 or deferred vested pension and to determine the amount of pension under said rules, except that the pension provided with respect to such service shall be determined solely on the minimum formula of the rules; and further, that such leave of absence shall be granted only to employees of [USX's] current steel producing operations (e.g., . . . Fairfield) who (a) prior to January 1, 1978 left active employment with [USX] in order to accept or continue employment with the Union, (b) from the time of cessation of active employment until September 1, 1984 shall have continued in the active employment of the Union and (c) shall continuously have held position servicing bargaining units at the [USX] division in which he had been employed.

(Emphasis added.) This provision gave Phillips and Rich exactly what they wanted. In fact, unbeknownst to Phillips and Rich, and perhaps even to Johnston, this provision granted continuous service to approximately fifty Union officials who, due to a prolonged break in service, had long ago lost any pension rights they may have had while employed by USX.

A "Basis for Proposal" accompanied Johnston's two-part proposal and read as follows:

> It is felt that there is a distinct advantage to be dealing with [Union] representatives who were formerly employed by [USX] concerning potential problems and/or grievances and implementation of the various collective bargaining agreements. Thus, it is in the company's interest to foster and to promote the good will of former employees who were granted leaves of absence to work for the [Union].

Twenty-five days before he submitted his proposal to the Committee, Johnston, anticipating the Committee's adoption of his proposal, signed a PF-116 form—a standard company form that both recommends and authorizes pensions for the person or persons named in the form—for Phillips and Rich and four of the Union officials named on their list. USX did not authorize pensions for three of the Union officials on the list: Thrasher (because Johnston did not like him); Jimmy Williams (because he had died after Phillips and Rich gave Miller the list but before the pension payments began); and David Newell (because he lacked enough years, even counting the new "continuous service" credit to qualify for a pension). Johnston back-dated the form to January 1, 1984, and indicated on the form that the pensions would be effective March 1, 1984.

A PF-116 normally originates at the steel mill, where the mill manager, the "recommender," signs the form and thereby recommends that the employee be given a pension, and another management official at the mill, the "checker," determines whether the employee is qualified for the pension and signs the form. Then, the form goes to a higher official, in Pittsburgh, who signs the form as the "authorizer." Finally, the form returns to the mill, where the USX employee benefits office certifies to the corporation administering USX's pension fund, the United States Steel and Carnegie Pension Fund, Inc. (the "Administrator"),

that the employee is entitled to a pension (in a specified amount). In this case, however, Johnston signed the PF-116 as both the recommender and the authorizer. Tom Sterling, the Fairfield manager, signed the form as the checker.[11]

When the PF-116 arrived at the employee benefits office at Fairfield, the employees in the office questioned its propriety and reported the matter to their supervisor, who in turn called USX headquarters in Pittsburgh. After speaking to his superior there, the supervisor instructed the benefits office employees to "keep the matter quiet." The PF-116 never entered the benefits office's records system; the benefits office nevertheless certified to the Administrator that Phillips, Rich and the four others named on the form were eligible for pensions.

After the benefits office notified the six Union employees that they were eligible for pensions, five of them (all except Phillips, who was in Florida at the time) came to the office and signed pension applications indicating that they had retired from USX effective March 1, 1984. One of the Union officials signed an application on behalf of Phillips. Although accepting such pensions violated the Union's rules,[12] all six continued to work for the Union.

---

[11] As indicated in the text, *supra*, the second part of Johnston's proposal, if implemented, would render eligible for pensions approximately 50 Union officials who, due to the basic agreement's two-year limit on leaves of absence, were not entitled to receive them. In filling out the PF-116, neither Johnston nor anyone else at USX made any effort to identify these potential pensioners and to place their names on the form.

[12] The Union's Manual for Representatives expressly prohibited any Union official from receiving a pension from a company unless the pension was authorized by a collective bargaining agreement. Since USX and the Union had not renegotiated the two-year limitation on leaves of absence in the 1983 basic agreement, the Union policy prohibited the six from accepting USX pensions. The relevant provisions of that policy, which were conditions of Phillips' and Rich's employment with the Union, stated as follows:

Of the six Union officials granted pensions, only Rich met the requirements set out in the second part of the Johnston proposal as adopted. Phillips did not qualify because he left USX to work for another union, the CIO. The remainder did not qualify because they, as Union employees, did not service bargaining units at the USX division where they had been employed.

The Administrator finished processing the applications on November 19, 1984, and mailed the initial pension checks on December 1, 1984. From the end of 1984, when the payments began, to the middle of 1988, Rich and Phillips received $48,318 and $55,319, respectively.

Long before the Committee's decision here, USX and the Administrator had entered into a contract whereby USX undertook to perform some of the duties ERISA imposed on the Administrator. ERISA requires the administrator of a pension plan to notify the Department of Labor and all of the plan's participants of any material changes to the pension plan. The Corporate Policy Committee's decision to authorize pensions for Phillips and Rich and the approximately fifty other similarly situated

---

4. No responsible trade union official should accept "kickbacks," under-the-table payments, gifts of other than nominal value, or any personal payment of any kind other than regular pay and benefits for work performed as an employee from an employer or business enterprise with which his union bargains collectively.

. . . .

6. *Leaves of Absence and Pension Credits.*

Representatives shall be entitled to obtain and maintain leave of absence status and/or pension credits from employers only to the extent that such leaves of absence and/or pension credits are *expressly granted or authorized by the terms of a collective bargaining agreement* with the [Union], and the duration of such leaves of absence and/or pension credits shall be in strict conformity to the limitations provided in such collective bargaining agreement.

(Emphasis added.)

Union officials constituted a material change in the pension plan; thus, such notification was required. Among the duties that USX assumed was the Administrator's duty to notify the Department of Labor and the pension plan's participants of the Committee's creation of a new class of beneficiaries (by adopting the second part of Johnston's proposal). USX, however, failed to notify the Department of Labor or the pension plan's participants that a new class of pension beneficiaries had been created.[13]

On November 15, 1989, a federal grand jury returned a sixteen-count indictment against USX, Phillips, and Rich. Count one charged all of the defendants with conspiring to make and receive payments prohibited by the Taft-Hartley Act, 29 U.S.C. § 186(a)(4) and (b). Counts two and three charged Rich and Phillips, respectively, with receiving payments in violation of section 186(b)(1). Counts four and five charged USX with making payments to Phillips and Rich respectively, in violation of section 186(a)(1). Counts six through fifteen charged USX, Phillips, and Rich with mail fraud in violation of 18 U.S.C. § 1341. Count sixteen charged USX with failing to notify the pension plan participants of the modification of their pension plan in violation of ERISA, 29 U.S.C. § 1131.

The case went to trial on March 5, 1990. At the conclusion of the government's case-in-chief on May 21, 1990, the district court granted the government's motion to dismiss the mail fraud charges against Phillips. The case went to the jury on the charges that remained on July 1, 1990. The jury acquitted Rich on the mail fraud counts but returned verdicts of guilty on all remaining counts against all three defendants. They now appeal their convictions; Phillips and Rich also appeal their sentences.

---

[13] The Corporate Policy Committee similarly failed to notify any USX officials, including those responsible for benefits and labor relations in the various field offices, of the creation of the new class of pension beneficiaries.

Of the claims of error raised on appeal, only three merit discussion. The first claim, addressed in Part II, is that the court's jury instruction on an exception to the prohibitions of the Taft-Hartley Act, 29 U.S.C. § 186(c)(1), precluded a legitimate defense argument, that a payment by an employer to his former employee is not prohibited by the Taft-Hartley Act so long as the payment was made "by reason of" the employee's service, and was not a bribe. The two remaining claims, addressed in Part III, are: (a) that the district court's charge to the jury on the criminal enforcement provision of the Taft-Hartley Act, 29 U.S.C. § 186(d)(2), allowed the jury to convict on Counts two through five without finding the requisite level of criminal intent; and (b) that the court's jury instruction on the criminal enforcement provision of ERISA, 29 U.S.C. § 1131, similarly allowed the jury to convict on Count sixteen without finding the appropriate level of criminal intent.[14]

---

[14] Appellants' other claims of error are patently meritless and do not warrant further discussion. These claims are: (1) the trial court erred in altering the indictment for counts two through five by deleting certain language, "intent to influence," as surplusage; (2) the trial court erroneously struck evidence concerning the practices of other steel producers in granting benefits to employees engaging in union activities and improperly instructed the jury to disregard such practices, thereby impeding appellants from contesting the mens rea element of the count one conspiracy charge; (3) the trial court erred in admitting evidence, including legal documents and related rulings from prior cases, concerning appellants' knowledge of illegality; (4) the trial court improperly refused to consolidate the trial of the instant case with the trial of the government's case against J. Bruce Johnston, thereby depriving appellants of Johnston's testimony (Johnston claimed Fifth Amendment immunity and did not testify at appellants' trial); (5) the trial court erroneously removed an essential element of the Taft-Hartley Act offenses from the jury by instructing the jury that USX's steelworkers were engaged in an industry affecting commerce; (6) the trial judge's overall conduct in the presence of the jury, in which he allegedly displayed a bias against appellants, deprived them of a fair trial; (7) the trial court erroneously

II.

We first consider appellants' claim that the district court's charge to the jury regarding an exception to the Taft-Hartley Act was erroneous because it precluded a legitimate defense argument.[15]

The Taft-Hartley Act, 29 U.S.C. §§ 141-187, is, in part, a conflict-of-interest statute designed to eliminate practices that have the potential for corrupting the labor movement. *United States v. Pecora,* 798 F.2d 614, 622 (3d Cir.1986). To achieve this goal, Congress prohibited *all* payments from employers to representatives of their employees and union officials. Section 186(a) prohibits employers, in industries affecting interstate commerce, from paying anything of value to representatives of their employees or union officials.[16] Section 186(b) prohibits

---

excluded evidence, on the ground that it was irrelevant, that the government had approved of leave of absence provisions similar to the USX-Union basic agreement in effect when USX authorized the pensions here in issue; (8) the trial judge erred in refusing to instruct the jury on appellants' good faith defense to the mail fraud charges; (9) the evidence was insufficient to establish a case of mail fraud against USX; (10) the evidence was insufficient to establish USX's noncompliance with ERISA; (11) the trial court admitted documents that had not been adequately identified; (12) the district court erred by quashing Phillips' and Rich's subpoenas for then Attorney General Richard Thornburgh and Fred Reebels, a labor mediator, and thereby deprived them of evidence that the government had approved leave of absence provisions similar to the provision contained in the USX-Union basic agreement in effect when the pensions here at issue were awarded; and (13) the trial court misapplied the United States Sentencing Commission Guidelines in fashioning Phillips' and Rich's sentences.

[15] Because a challenge to a jury instruction presents a question of law, our review is *de novo. See United States v. Chandler,* 996 F.2d 1073, 1085 (11th Cir.1993).

[16] The pertinent part of 29 U.S.C. § 186(a) provides as follows:

> It shall be unlawful for any employer . . . to pay, lend, or deliver . . . any money or other thing of value—

representatives and union officials from receiving such payments.[17]

Appellants' argument focuses on the district court's instruction to the jury concerning section 186(c)(1), which contains an exception to the broad prohibitions of sections 186(a) and (b). Section 186(c)(1) provides that sections 186(a) and (b) shall not be applicable "in respect to any money . . . payable by an employer to . . . any officer or employee of a labor organization, who is also an employee or former employee of such employer, *as compensation for, or by reason of, his service as an employee of such employer.*" (Emphasis added.) The district court instructed the jury that the exception applies

> only to payments by an employer to former employees *for past services actually rendered* by those former employees *while* they were employees of the employer company. . . . [T]he Court further instructs you that whether payments in the form of USX Corporation pension payments and money paid thereby were made by or for USX Corporation to an individual defendant as compensation for or by reason of that defendant's past service as an employee of USX Corporation is a factual issue for you to decide from the evidence in the case.

(Emphasis added.)

> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> . . . .
>
> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

[17] The pertinent part of 29 U.S.C. § 186(b) provides as follows:

> (1) It shall be unlawful for any person to request, demand, receive, or accept . . . any payment, loan, or delivery of any money or other thing of value prohibited by [section 186(a)].

Appellants contend that the pension payments USX made to Phillips and Rich qualify for an exception under section 186(c)(1). Although appellants concede that the pension payments were not given "as compensation for" the past service of Phillips and Rich as USX employees, they argue that section 186(c)(1) also excepts payments given "by reason of" service as former employees, which, unlike compensation, need not be for past services actually rendered by those former employees while they were employees of the employer company. The district court, they contend, ignored the "by reason of" language in section 186(c)(1) and thereby precluded this legitimate defense argument.[18]

We disagree with appellants' interpretation of the trial court's jury instruction; we do not read it as ignoring the "by reason of" portion of section 186(c)(1). Congress, in using the alternative formulations of "as compensation for" and "by reason of" in that provision, intended to remove from the statute's prohibitions two general categories of payments to employees: (1) wages, i.e., sums paid to an employee specifically "as compensation for" work performed; and (2) payments not made specifically for work performed that are occasioned "by reason of" the fact that the employee has performed (or will perform, in the case of a current employee) work for the employer. *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union,* 791 F.2d 1046, 1049 (2d Cir. 1986). The latter category includes employee "fringe"

---

[18] Appellants contend that if we place our imprimatur on the district court's jury instruction, we will, in effect, render unlawful *per se* many legitimate fringe benefits, including no-docking provisions and the accrual of benefits (such as pension credits and seniority) during the period that an employee is on leave as a union official. "No-docking" provisions allow union officers who are full-time company employees to take time off from work, with pay, to conduct union business. This contention greatly overstates the reach of the district court's instruction, so we need not address it.

benefits, such as vacation pay, sick pay, and pension benefits. *Id.* Whether "as compensation for" or "by reason of" service to an employer, all payments from an employer to a union official must relate to services actually rendered by the employee for the section 186(c)(1) exception to apply.

Since it was undisputed that both Phillips and Rich had severed their employment relationship with USX before USX authorized their pensions, the district court accurately observed that the pension payments in this case must have been "for *past* services actually rendered by those *former* employees *while they were employees*" to fall within the section 186(c)(1) exception. (Emphasis added.) Once an employee has severed the employment relationship with his employer, he is described accurately as a *former* employee. Because section 186(c)(1) only excepts payments given "as compensation for" or "by reason of" an employee's "service as an employee," a payment given to a *former* employee must be for services he rendered *while he was an employee* to qualify for the exception. A payment given to a *former* employee for present or future services, which by definition could not be "as compensation for" or "by reason of" his "service as an employee," would violate the plain language of the exception and would be exactly the type of conflict-tainted payment that Congress designed the Taft-Hartley Act to prevent.

Further, the trial court's jury instruction, and our interpretation of it, is entirely consistent with decisions of other courts interpreting section 186(c)(1). An employee's "right" to receive a "benefit" while on leave with the union has been upheld when it vested *before* the employee began the leave of absence to work for the union as well as *before* the employer delivered the benefits. Thus, the employer granted the benefits to the employee *for past services actually rendered* by the former employee *while* he was an employee of the employer, since the employee had

earned the full right to receive the benefits before going on a leave of absence to work for the union. *See, e.g., NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849 (5th Cir. 1986) (finding that a collective bargaining agreement granting employees certain benefits under the plan while they were on "union leaves" of absence from the employer fell within the § 186(c)(1) exception); *BASF Wyandotte Corp.*, 791 F.2d 1046 (same for no-docking provisions). In contrast, the section 186(c)(1) exception does not apply when a company pays a union official who was a former employee, but who did not have a right to such payment before he severed his employment relationship with the company. In *Toth v. USX Corp.*, 883 F.2d 1297 (7th Cir.), *cert. denied*, 493 U.S. 994, 110 S.Ct. 544, 107 L.Ed.2d 541 (1989), the Seventh Circuit, in an action against USX for denying pensions to Union officials who were eligible under the second part of the Johnston proposal as adopted, considered pension payments identical to those at issue in this case and found that they were illegal because they did not fall into any of the exceptions listed in section 186(c). The court stated that USX's policy

> cannot qualify as "compensation for or by reason of" former employment because . . . USX's leave policy was not a part of the bargained-for collective bargaining agreement. It was a unilateral change—under [USX's] own allegations, a bribe. That the change here was at least conducive to or suggestive of bribery . . . should indicate why it is not suitable for exemption from the general section [186] prohibition on gifts or loans from employers. Allowing more former employees to "get in" on the bribe would hardly further the purposes of section [186].

Id. at 1305 (footnote omitted). We agree with the Seventh Circuit that payments akin to those in this case do not fall within the section 186(c)(1) exception. When an employee's right to a benefit has fully vested before

the leave of absence begins, there is no danger of corruption when the employer delivers the benefit after that employee leaves the company to work for the union; the employer is merely satisfying a preexisting obligation that is unaffected by the employee's current status with the union. Where, however, as in the case before us, company officials ignore the company's collective bargaining agreement with a union and secretly grant retroactive leaves of absence, and thus pension benefits, to a small number of the union's officials (and those officials ignore union policy and accept the benefits), all of the evils that prompted Congress to pass the Taft-Hartley Act are present.

We hold that all payments given by an employer to a former employee must be for past service actually rendered by the former employee while employed by the employer to qualify for an exception under section 186 (c)(1). Accordingly, because the jury charge in this case accurately stated the law, and because the question of whether appellants' actions conformed with the requirements of section 186 was properly left to the jury, we conclude that the district court committed no error and thus reject appellants' first claim.

III.

We next address appellants' claim that the district court misinterpreted the term "willfully" as used both in 29 U.S.C. § 186(d)(2) and in 29 U.S.C. § 1131, the applicable criminal enforcement provisions of the Taft-Hartley Act and ERISA, respectively. Appellants argue that the district court's misinterpretations resulted in jury instructions that set forth a prejudicially low standard of criminal intent for the charges under the Taft-Hartley Act and ERISA.[19]

---

[19] Because these contentions present solely a question of law, our review is *de novo*. *See Chandler*, 996 F.2d at 1085.

As the Supreme Court has observed, the term "willfully" has " 'many meanings,' and 'its construction [is] often . . . influenced by its context.' " *Ratzlaf v. United States,* —— U.S. ——, ——, 114 S.Ct. 655, 659, 126 L.Ed.2d 615 (1994) (quoting *Spies v. United States,* 317 U.S. 492, 497, 63 S.Ct. 364, 367, 87 L.Ed. 418 (1943)). *See also United States v. Murdock,* 290 U.S. 389, 395, 54 S.Ct. 223, 225, 78 L.Ed.2d 381 (1933) ("Aid in arriving at the meaning of the word 'willfully' may be afforded by the context in which it is used."). The interpretation of willfully "turns on [each statute's] own peculiar facts." *Screws v. United States,* 325 U.S. 91, 101, 65 S.Ct. 1031, 1035, 89 L.Ed. 1495 (1945).

For instance, in some contexts, courts have interpreted "willfully" as requiring a finding of general intent, meaning the intent to engage in the prohibited conduct; that is, acting voluntarily, knowingly, and intentionally, and not accidently or mistakenly. *See, e.g., Browder v. United States,* 312 U.S. 335, 341, 61 S.Ct. 599, 603, 85 L.Ed. 862 (1941) (interpreting 22 U.S.C. § 220, which provides punishment for a person who knowingly and willfully uses any passport secured by the making of a false statement). Thus, a defendant need not intend to violate the law to commit a general intent crime, but he must actually intend to do the act that the law proscribes.[20] In other circumstances, courts have construed the term "willfully" to require a finding of specific intent, meaning the intent to violate the law; that is, acting with a "bad purpose" to disobey or disregard the law. *See, e.g., Cheek v. United States,* 498 U.S. 192, 200, 111 S.Ct. 604, 609, 112 L.Ed.2d 617 (1991) (interpreting the Internal Revenue Code and noting that the specific intent interpretation of "willfully" in the federal tax statutes is an "exception to the traditional rule" that "willfully"

---

[20] The term "law" in this context means the law as a whole, not any specific statute.

requires a finding of only general intent, applied "largely due to the complexity of the tax law").

This appeal therefore requires us to make the same determination concerning each of the criminal enforcement provisions under which the appellants were convicted: whether the use of the term "willfully" in each statute requires a finding of general or specific intent as we have defined those terms. While our inquiry is the same for the criminal enforcement provisions of both the Taft-Hartley Act, 29 U.S.C. § 186(d)(2), and ERISA, 29 U.S.C. § 1131, we must remain "mindful of the complex of provisions in which they are embedded." *Ratzlaf*, —— U.S. at ——, 114 S.Ct. at 659.

A.

We first address appellants' claim that the district court's misinterpretation of 29 U.S.C. § 186(d)(2), the applicable criminal enforcement provision of the Taft-Hartley Act, resulted in an erroneous jury charge that allowed the jury to convict on Counts two through five without finding the appropriate level of intent. This claim raises an issue of first impression in this circuit.

Appellants' argument centers on the trial judge's interpretation of the term "willfully" in section 186(d)(2), which provides that "any person who willfully violates [section 186] shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000. . . ." The district court instructed the jury that:

> [T]he Government is not required to prove that the pension payments were made by or for USX Corporation or received by the individual defendants with an evil or bad purpose or with the intent to violate the law or with knowledge that the law would be or was violated. Neither is it necessary . . . for the Government to prove that Thermon Phillips and E.B. Rich intended to be influenced by their acceptance and receipt of such pension payments or that

they or either of them were in fact influenced by such payments. However, the Government must prove that the defendants acted "willfully". . . .

The word "willfully" means that a person or entity charged as a defendant knowingly and intentionally committed acts which constitute the offense charged and that such acts were not committed accidentally or by some mistake. For example, if USX Corporation caused a pension check to be sent to one of the individual defendants by accident or mistake, such as a computer error, such USX Corporation act would not be intentional and thus would not be willful. On the other hand, if USX Corporation intended for such a pension check to be sent and knowingly caused it to be sent then that act would be willful.

The word "knowingly" imports only a knowledge of the existence of the facts in question. The word does not require, as a part of its meaning, that there be any knowledge or awareness that such act or omission is prohibited by law. . . .

[T]he government [is not required] in this case to prove a specific intent by the defendant to violate this Taft-Hartley statute or a particular part thereof in order to establish the federal criminal offense charged.

Appellants maintain that section 186(d)(2) requires a finding of specific, and not merely general, intent, and that the district court therefore erred by not giving the Eleventh Circuit pattern jury instruction on "willfully," which defines the term as meaning "that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law." Eleventh Circuit District Judges Ass'n, *Pattern Jury Instructions: Criminal Cases,* Basic Instruction No. 9.1 at 22 (1985). The term "bad purpose" does not mean evil motive, but merely the intent to act in knowing or reckless disregard of the law.

See United States v. Pomponio, 429 U.S. 10, 12, 97 S.Ct. 22, 23, 24, 50 L.Ed.2d 12 (1976). Thus, according to appellants, the district court should have instructed the jury that the Government was required to prove that the defendants acted with specific intent, which means, at a minimum, that they acted with reckless disregard of the Act's prohibitions.

Initially, we note that appellants' reading of the statute is the minority view; the Second, Third, Sixth, and Ninth Circuits all have held that the term "willfully" as used in section 186(d) requires proof only of general intent.[21] Although appellants recognize that other circuits have interpreted section 186(d) as requiring a finding of only general intent, they maintain that these decisions are erroneous and based on a faulty reading of dictum in *United States v. Ryan*, where the Supreme Court stated that "[a]s [section 186] reads, it appears to be a criminal

---

[21] *See, e.g., United States v. Cody*, 722 F.2d 1052, 1059 (2d Cir.) (requiring proof only that defendant "received and knew that he was receiving a benefit of value"), *cert. denied*, 467 U.S. 1226, 104 S.Ct. 2678, 81 L.Ed.2d 873 (1983); *United States v. Pecora*, 484 F.2d 1289, 1294 (3d Cir.1973) (requiring knowledge only "(1) that there were 'payments'; and (2) that the payments came from employers who employed workers represented by [defendant]"); *United States v. Carter*, 311 F.2d 934, 943 (6th Cir.) (quoting Hand, J., with approval: "the word 'willful,' even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law."), *cert. denied*, 373 U.S. 915, 83 S.Ct. 1301, 10 L.Ed.2d 415 (1963); *United States v. Bloch*, 696 F.2d 1213, 1216 (9th Cir.1982) ("A 'willful' violation of 29 U.S.C. § 186 requires only that the defendant act with knowledge that the payments are from a person acting in the interest of an employer. . . . [K]nowledge of the statutory prohibition itself is not necessary."); *see also United States v. Silva*, 517 F.Supp. 727, 735 (D.R.I.1980) ("The word 'willfully' means that the person knowingly and intentionally committed the acts which constituted the offenses charged. . . . The word does not require, as a part of its meaning, that there be any knowledge or awareness that such act or omission is in fact prohibited by law."), *aff'd*, 644 F.2d 68 (1st Cir.1981).

provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative." 350 U.S. 299, 305, 76 S.Ct. 400, 404, 100 L.Ed. 335 (1956). From this statement, appellants contend, the Second and Third Circuits erroneously concluded that knowledge of illegality is not an element of a criminal offense under section 186.[22] They urge this court to follow the specific intent interpretation approved by the Seventh Circuit. *See, e.g., United States v. Papia*, 910 F.2d 1357, 1362 (7th Cir.1990).[23]

Whether these decisions misread dictum in *Ryan* is not relevant, however, because there are two independent reasons, which these decisions do not discuss, why we should reject appellants' contention that section 186(d)(2) requires a finding of specific intent. First, Congress designed the language and structure of section 186 around a general intent interpretation of "willful" in section 186(d). Second, Congress, recognizing the majority interpretation of "willful" in section 186(d) as requiring general intent,

---

[22] *See United States v. Ricciardi*, 357 F.2d 91, 100 (2d Cir. 1966); *United States v. Lanni*, 466 F.2d 1102, 1110 (3rd Cir. 1972); *see also Carter*, 311 F.2d at 943-44 (citing *United States v. Ryan*, 232 F.2d 481 (2d Cir.1956) (on remand from the Supreme Court)); *Bloch*, 696 F.2d at 1216 (citing *Carter*).

[23] In *Papia*, the court rejected the argument that the appellant was entitled to a jury instruction that "[a] person who intentionally performs an act, aware that the law prohibits the act, or in reckless disregard of the law's prohibitions, has intentionally done an act forbidden by law," because the court saw little difference between the requested instruction and the given instruction, "[a]n act is done 'willfully' if done voluntarily and intentionally, and with the intent to do something the law forbids; that is to say, with a purpose either to disobey or disregard the law." *Id.* at 1362. The court, however, did not reach the question of whether the Act requires an instruction that a person must act "with a purpose either to disobey or disregard the law" to be convicted, because the trial court had given a specific intent instruction. Thus, we do not read *Papia* as involving the same issue involved in this case.

left the mens rea component unchanged when it created section 186(d)(2) in 1984. We discuss each reason in turn.

1.

After briefly reviewing the statutory scheme of section 186, we explain why the language of section 186 and the dual structure of both section 186(a) and section 186(d) compel the conclusion that Congress intended "willfully" in section 186(d) to require a finding of only general intent.

a.

Section 186 is divided into four parts: section 186(a) prohibits employers, in industries affecting interstate commerce, from paying anything of value to "representatives" of their employees or union officials; section 186(b) prohibits representatives and union officials from receiving such payments; section 186(c) provides nine exceptions to the prohibitions of sections 186(a) and (b); and section 186(d) contains the criminal enforcement provisions of the Taft-Hartley Act.

Section 186(c) contains two types of exceptions. The first three exceptions, sections 186(c)(1)-(3), describe payments that do not have the potential for corrupting the labor movement. Section 186(c)(2), for example, contains an exception for payments "in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress." The last six exceptions, sections 186(c)(4)-(9), describe payments that could corrupt the labor movement unless certain protective requirements are met. These sections describe the type of payment that is eligible for the exception and then outline the technical requirements that must be met before a payment will qualify for the exception. For example, section 186(c)(4) provides that sections 186(a) and (b) shall not be applicable

> with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner.

Thus, section 186 envisions three general classes of payments: payments that are always illegal (for which Congress did not provide an exception in section 186(c)); payments that are always legal (for which Congress provided the exceptions in sections 186(c)(1)-(3)); and payments that may be legal if they satisfy certain technical requirements (for which Congress provided the exceptions in sections 186(c)(4)-(9)).

Before Congress amended section 186 in 1984, the criminal enforcement provision in section 186(d) provided that "[a]ny person who willfully violates any of the provisions of . . . section [186] shall . . . be guilty of a misdemeanor." Congress, recognizing that "[f]ederal prohibitions and penalties designed to protect the legitimacy of labor relations have . . . proved to be inadequate," strengthened the Taft-Hartley Act in 1984, making a payment or receipt of over $1,000 punishable by up to five years imprisonment. Senate Comm. on the Judiciary, Comprehensive Crime Control Act of 1984, S.Rep. No. 225, 98th Cong., 2d Sess. 297 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3477.

Congress acknowledged, however, that the payments described in section 186(c)(4)-(9) do not generally involve payoffs, bribes, or conflicts of interest, and that one could violate the Act merely by failing to satisfy a technical requirement. *Id.* at 297, *reprinted in* 1984 U.S.C.C.A.N. at 3477. To avoid the imposition of heightened penalties for "inadvertent" conduct, Congress

divided the criminal enforcement provision in section 186(d) into two parts.[24] The first part, section 186(d)(1) applies only to violations caused by payments that could have fallen within the exceptions provided by sections 186(c)(4)-(9) had the payments met their requirements. Section 186(d)(1) requires proof that a person participated in a payment "willfully *and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment. . . .*" (Emphasis added.) The second part, section 186(d)(2), applies to all violations not covered by section 186(d)(1), including the violations in this case. The mens rea component of section 186(d)(2) remains unchanged from the former section 186(d); it requires proof only that a person "willfully violate[d] this section."

b.

The only difference between sections 186(d)(1) and (d)(2) is the additional "intent" requirement of section 186(d)(1). Section 186(d)(1) now requires that the government establish more than general intent, namely that the defendant participated in a payment "willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive . . . a thing of

---

[24] As amended, section 186(d) provides as follows:

(d) Penalty for violations

(1) Any person who participates in a . . . payment . . . [which] does not satisfy all of the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment . . . shall . . . be guilty of a felony [if value of payment exceeds $1,000]. . . .

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section . . . shall . . . be guilty of a felony [if value of payment exceeds $1,000]. . . .

29 U.S.C. § 186(d) (1988).

value." Congress had to have intended the term "willfully" as used in both sections 186(d)(1) and (d)(2) to require a finding of general intent; otherwise, the "intent to benefit" language in section 186(d)(1) would be superfluous, because a person who had the specific intent to violate the Taft-Hartley Act would also necessarily intend to benefit himself or to influence a union official. Under appellants' interpretation, the additional intent requirement of section 186(d)(1) would serve only to except payments made with the specific intent to violate the law, but without the intent to benefit himself or to influence the recipient. We seriously question whether this scenario could actually occur, let alone whether Congress intended such an absurd statutory scheme. It is well established that "[j]udges should hesitate . . . to treat statutory terms [as mere surplusage] in any setting, and resistance should be heightened when the words describe an element of a criminal offense." *Ratzlaf*, —— U.S. at ——, 114 S.Ct. at 659. Moreover, had "willfully" in section 186(d) required a finding of specific intent before the 1984 amendment, Congress would not have needed to create section 186(d)(1) to avoid the imposition of heightened penalties for inadvertent conduct.

c.

Appellants' interpretation of "willfully" also renders other aspects of the statutory scheme of the Taft-Hartley Act meaningless. In sections 186(a)(1) and (a)(2), Congress prohibited *any* payment by an employer to an employee representative.[25] In sections 186(a)(3) and

---

[25] The pertinent part of 29 U.S.C. §§ 186(a)(1)-(2) provides as follows:

> It shall be unlawful for any employer . . . to pay . . . any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents . . . any of the employees of such

(a)(4), Congress prohibited *any* payment by an employer to a *larger class* of individuals and groups, including union officials, union employees, and individuals or groups who could influence employee representatives, if the payment was made with the "intent to influence" the recipient.[26]

Given that the "intent to influence" language is in sections 186(a)(3)-(4) and not in the section 186(d)(2) criminal enforcement provision, Congress must have intended sections 186(a)(1)-(2) to prohibit payments to representatives even if they were made without any intent to influence. Any other interpretation would render the requirement of "an intent to influence" in sections 186(a)(3) and (a)(4) mere surplusage. Under appellants' interpretation of "willfully" in section 186(d), sections 186(a)(1) and (a)(2) would serve only to prohibit payments made to employee representatives without any intent to influence but with the specific intent to violate the law. We cannot agree with such a nonsensical result; the statutory scheme is coherent and rational when "willfully" is interpreted as requiring only general intent.

---

employer who are employed in an industry affecting commerce. . . .

[26] The pertinent part of 29 U.S.C. §§ 186(a)(3)-(4) provides as follows:

> It shall be unlawful for any employer . . . to pay . . . any money or other thing of value—
>
> (3) to any employee or group or committee of employees of such employer . . . in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly *to influence* any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
>
> (4) to any officer or employee of a labor organization . . . *with the intent to influence* him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.
>
> (Emphasis added.)

d.

For these reasons, appellants' interpretation of the term "willfully" in section 186(d) is illogical and inconsistent with the language and structure of the Taft-Hartley Act. The double enforcement provision in section 186(d) and the dual structure of prohibited payments in section 186 (a) suggest that Congress intended the term "willfully" to require proof only that the payment was made knowingly and intentionally, not accidentally or by some mistake.

2.

The second reason for rejecting appellants' interpretation of the term "willfully" in section 186(d) is based not upon what Congress expressly provided in the language and structure of section 186, but upon what Congress left unchanged when it amended the section 186(d) criminal enforcement provision in 1984. When Congress amended section 186(d) in 1984, it made no attempt to change the clear majority rule that "willfully" required a finding of only general intent.[27] Because Congress left the willful-

---

[27] By 1984, the Second, Third, Sixth, and Ninth Circuits had interpreted the term "willfully" in section 186(d) as requiring only proof of general intent. *See, e.g., Cody,* 722 F.2d at 1059; *Pecora,* 484 F.2d at 1294; *Carter,* 311 F.2d at 943; *Bloch,* 696 F.2d at 1216; *see also Silva,* 517 F.Supp. at 735. The only circuit holding to the contrary was the Seventh Circuit. The Seventh Circuit cases, however, were contradictory and internally inconsistent. In *United States v. Inciso,* 292 F.2d 374, 380 (7th Cir.), *cert. denied,* 368 U.S. 920, 82 S.Ct. 241, 7 L.Ed.2d 135 (1961), the court held that section 186(d) "contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section." In *United States v. Keegan,* 331 F.2d 257, 261-62 (7th Cir.), *cert. denied,* 379 U.S. 828, 85 S.Ct. 57, 13 L.Ed.2d 37 (1964), however, the court held that a jury instruction requiring proof of only the first element of a two-part definition of reckless conduct, "knowledge of the material facts surrounding the proscribed conduct," without the second element, "whether a reasonable man would be aware that such conduct would likely be illegal," was sufficient. *See also United States v. Kaye,* 556 F.2d 855, 863-64

ness requirement of former section 186(d) unchanged when it created section 186(d)(2) in 1984, we can only assume that Congress intended "willfully" to require a finding of only general intent. Congress is presumed to be knowledgeable about existing case law pertinent to any legislation it enacts, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 325, 112 L.Ed.2d 275 (1990), and about the basic rules of statutory construction, *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496, 111 S.Ct. 888, 898, 112 L.Ed.2d 1005 (1991).

Congress, had it intended "willfully" to require specific intent, would have taken steps to ensure that the statute overruled those cases holding otherwise. Conspicuously, signs of congressional intent to change the majority rule are absent from both the face of the statute and the legislative history. When considered with the language and structure of the statute, the absence of signs of congressional intent to overrule the prior cases bolsters our conclusion that the term "willfully" requires a finding of general intent.

(7th Cir.) (following *Keegan*), *cert. denied*, 434 U.S. 921, 98 S.Ct. 395, 54 L.Ed.2d 277 (1977). A jury instruction consisting of only the first element of reckless conduct, knowledge of the material facts surrounding the proscribed conduct, is the practical equivalent of a general intent jury instruction.

The Tenth Circuit discussed section 186(d) in *Korholz v. United States*, 269 F.2d 897, 903 (10th Cir.), *cert. denied*, 361 U.S. 929, 80 S.Ct. 367, 4 L.Ed.2d 352 (1959), and upheld a jury instruction that a person must be "either conscious of the fact that what he is doing constitutes a violation of the law or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law or not." The court's discussion is too cryptic, however, to draw a conclusion about whether a general intent instruction would have been upheld. Consequently, the Tenth Circuit cannot be said to have clearly ruled on this issue at the time of the 1984 amendment of section 186(d).

3.

In sum, the language of section 186, the dual structures of sections 186(a) and 186(d), the case law interpreting 186(d) at the time Congress amended section 186, and the legislative history of the Taft-Hartley Act support the conclusion that Congress intended section 186(d)(2) to require a finding of only general intent. Despite these indications that Congress intended section 186(d)(2) to require a finding of only general intent, appellants contend that section 186(d)(2) requires a finding of specific intent, because the Taft-Hartley Act, like the Internal Revenue Code, is a complex statute that has been subject to widely disparate interpretations. They argue that Congress, particularly in a statute like the Taft-Hartley Act in which the boundaries of permissible action are ambiguous, intends the term "willfully" to create felony culpability only for those persons who know that their actions violate the law, or who recklessly disregard whether they have the right to act in the manner they have chosen.

The facts of this case illustrate perfectly why Congress intended the term "willfully" in section 186(d)(2) to require a finding of only general intent to sustain a conviction. Neither USX nor Phillips and Rich needed to consult section 186 to determine that their actions, in paying and receiving the pensions, were illegal; they knew these acts were illegal. Section 186 codifies a basic moral tenet: an employer should not bribe a representative of his employees (or make any payments that could be perceived as a bribe), and such a representative should not accept a bribe (or any payment that could be perceived as a bribe). Appellants, of course, knew this. In enacting section 186, Congress simply prohibited people, such as Phillips and Rich and the USX officials involved in this case, from committing acts that they should know are inherently wrong—whether or not they were aware of the text of section 186 is of no moment. Accordingly, the district court's jury charge accurately described the mens

rea requirement of section 186(d)(2) of the Taft-Hartley Act.

B.

We next consider USX's claim that the district court's charge to the jury with respect to the ERISA violation alleged in Count 16 set forth a prejudicially low standard of criminal intent. Again, the solution to the problem focuses on the proper interpretation of the term "willfully," and on whether the ERISA criminal enforcement provision requires a finding of general or specific intent. At issue is section 1131 of ERISA,[28] which makes it a criminal misdemeanor willfully to violate part 1 of ERISA, which contains the reporting and disclosure requirements governing those who control and administer employee benefit plans. Part 1 of ERISA requires the administrator [29] of a pension plan to notify the Department of Labor and the plan's participants and beneficiaries of any material modifications in the terms of the pension plan, such as the creation of a new class of pension beneficiaries. 29 U.S.C. § 1021 (1988).[30]

---

[28] The pertinent part of 29 U.S.C. § 1131 (1988) provides as follows:

> Any person who willfully violates any provision of part 1 of [ERISA], . . . shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.

[29] USX, by a contract with the Administrator of the USX pension fund, had assumed the duty ERISA imposes to report and disclose material modifications of the pension plan; consequently, USX was the "administrator" for the purpose of ERISA's reporting and disclosure requirements.

[30] The relevant provision in 29 U.S.C. § 1021 (1988), which provides in pertinent part:

> The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this

The district court charged the jury that a defendant who "knowingly and intentionally committed acts which [violated Part 1 of ERISA] and . . . were not committed accidentally or by some mistake" was guilty of violating Part 1 of ERISA. USX argues that section 1131 prohibits violations of Part 1 of ERISA caused by "act[s] committed voluntarily and purposefully, with the specific intent to do something the law forbids; that is with bad purpose to disobey or disregard the law." In support of this position, USX argues simply that ERISA is a complex statute; therefore, Congress intended "willfully" to require a finding of specific intent. USX, however, does not point to anything within the statute itself to support its argument. After examining the language and structure of ERISA, we cannot agree with USX's interpretation.

As explained by Congress, Part 1 of ERISA is designed: (1) to require the disclosure of significant information about employee benefit plans and all transactions engaged in by those who control the plans; (2) to provide specific data to plan participants and beneficiaries about the rights and benefits to which they are entitled and the circumstances that may result in a loss of those rights and benefits; and (3) to set forth the responsibilities and proscriptions applicable to persons occupying a fiduciary relationship to employee benefit plans. *See* House Education and Labor Committee, Employee Retirement Income Security Act of 1974, H.Rep. No. 533, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4648-49. To achieve the third goal, Congress codified a " 'prudent man' standard for evaluating the conduct of all fiduciaries." *Id.* at 4649. In doing so, Congress placed a

---

title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

(1) a summary plan description described in section 1022(a)(1) of this title; and

(2) the information described in sections 1024(b)(3) and 1025(a) and (c) of this title.

> twofold duty on every fiduciary: to act in his relationship to the plan's fund as a prudent man in a similar situation and under like conditions would act, and to act consistently with the principles of administering the trust for the exclusive purposes previously enumerated, and in accordance with the documents and instruments governing the fund unless they are inconsistent with the fiduciary principles of the section.

Id. at 4651.

Consistent with the codification of a prudent man standard, Congress, in 29 U.S.C. § 1028 (1988), provided a detailed set of exemptions from prohibited transactions and included a good faith defense for reliance on administrative interpretations. Section 1028 provides in pertinent part that

> [i]n any criminal proceeding under section 1131 of this title, based on any act or omission in alleged violation of [ERISA Part 1] . . . , no person shall be subject to any liability or punishment for or on account of the failure of such person to (1) comply with [ERISA Part 1] if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any regulation or written ruling of the Secretary, or (2) publish and file any information required by any provision of this part if he pleads and proves that he published and filed such information in good faith, and in conformity with any regulation or written ruling of the Secretary issued under this part regarding the filing of such reports. . . .

Thus, section 1028 serves to outline clearly the responsibilities of those in a fiduciary relationship to employee benefit plans and to ensure that the statutory codification of the prudent man standard is not undermined by later interpretations of ERISA. In short, Congress, in section 1108, specifically outlined what would serve as a valid de-

fense to a violation of the reporting and disclosure requirements.

This statutory good faith defense is necessary, however, only if a violation of the ERISA criminal enforcement provision in section 1131 is based only upon a finding of general intent. Under USX's construction, section 1108 would be superfluous because the government would have to prove specific intent for violations of Part 1 of ERISA; good faith is a complete defense to specific intent crimes. Although section 1108 could serve to limit the defenses that would be available if section 1131 required a finding of specific intent, this interpretation would, in effect, render "willfully" mere surplusage.

The only logical interpretation of Part 1 of ERISA is that the term "willfully" in section 1131 requires a finding of only general intent and that section 1108 provides additional statutory defenses not otherwise present for general intent crimes. Under this interpretation, sections 1131 and 1108 serve distinct purposes; the term "willfully" as used in section 1131 ensures that the act was done voluntarily and not by accident or mistake; and section 1131 provides the proper scope of defenses in accordance with the codified "prudent man" standard as determined by Congress. To interpret otherwise would render either the defenses in section 1108 or the term "willfully" in 1131 meaningless surplusage. Consequently, we conclude that the district court's charge to the jury sufficiently and accurately described the mens rea required for violations of ERISA Part 1.

IV.

For the reasons discussed above, we find no merit in any of appellants' claims of error. Accordingly, the judgments of the district court are affirmed.

IT IS SO ORDERED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. HM-253-S

UNITED STATES OF AMERICA

v.

USX CORPORATION, ET AL.,

JURY INSTRUCTIONS

June 20, 1990

(excerpts)

* * * *

[9686] Wilfulness (Taft-Hartley)

With respect to Counts 2 to 5, inclusive, the Government is not required to prove that the pension payments were made by or for USX Corporation or received by the individual defendants with an evil or bad purpose or with the intent to violate the law or with knowledge that the law would be or was violated. Neither is it necessary with respect to these particular counts for the Government to prove that Thermon Phillips and E. B. Rich intended to be influenced by their acceptance and receipt of such pension payments or that they or either of them were in fact thereby influenced by such payments. However, the Government must prove that the defendants acted, quote, "wilfully," close quote, with

respect to the acts which Counts 2 to 5, inclusive, respectively charge were committed by them.

The word, quote, "wilfully," close quote, means that the person or entity charged as a defendant knowingly and intentionally committed acts which [9687] constitute the offense charged and that such acts were not committed accidentally or by some mistake. For example, if USX Corporation caused a pension check to be sent to one of the individual defendants by accident or mistake, such as an computer error, such USX Corporation act would not be intentional and thus would not be wilful. On the other hand, if USX Corporation intended for such a pension check to be sent and knowingly caused it to be sent, then that act would be wilful.

The word, quote, "knowingly," close quote, imports only a knowledge of the existence of the facts in question. The word does not require, as a part of its meaning, that there be any knowledge or awareness that such act or omission is prohibited by law.

With respect to Counts 2 to 5, inclusive, and to each such count, the Court reiterates that neither Title 29, United States Code, Section 186, nor the law otherwise, requires the Government in this case to prove a specific intent by the defendant to violate this Taft-Hartley statute or a particular part thereof in order to establish the federal criminal offense charged.

* * * *

APPENDIX C

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 90-7721

U.S.

v.

PHILLIPS (THERMON), RICH (E. B.), USX CORPORATION, a/k/a U.S. STEEL CORPORATION

Aug 09, 1994

DENIALS OF REHEARING EN BANC

(The decision of the Court is referenced in an Eleventh Circuit Table of Denials of Rehearing En Banc appearing in the Federal Reporter.)

APPENDIX D

Statutory Provisions

The following provisions of Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 141 *et seq.* ("LMRA") are involved:

LMRA § 302(a), 29 U.S.C. § 186(a), provides:

> It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
>
> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

LMRA § 302(b)(1), 29 U.S.C. § 186(b)(1), provides:

> It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

LMRA § 302(c)(1), 29 U.S.C. § 186(c)(1), provides:

> The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer;

LMRA § 302(d)(2), 29 U.S.C. § 186(d)(2), provides:

> Except for transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(4) (3)

Nos. 94-830 and 94-831

FILED
FEB 8 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

USX CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

THERMON PHILLIPS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

32pp

QUESTIONS PRESENTED

1. Whether Section 302(a) of the Labor Management Relations Act, 29 U.S.C. 186(a), prohibits an employer from retroactively granting full-time union officials who are former employees indefinite leaves of absence to earn credits toward pension eligibility.

2. Whether Section 302(d)(2), which makes it a felony to violate Section 302(a) "willfully," requires proof that a defendant acted with the specific intent to do something that the law forbids.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Statement	2
Argument	12
Conclusion	26

TABLE OF AUTHORITIES

Cases:

Arroyo v. *United States*, 359 U.S. 419 (1959)	13
BASF Wyandotte Corp. v. *Local 227, International Chemical Workers Union*, 791 F.2d 1046 (2d Cir. 1986)	16
Cheek v. *United States*, 498 U.S. 192 (1991)	18
Communications Workers of America v. *Bell Atlantic Network Services, Inc.*, 670 F. Supp. 416 (D.D.C. 1987)	16
Korholz v. *United States*, 269 F.2d 897 (10th Cir. 1959), cert. denied, 361 U.S. 929 (1960)	24
Miles v. *Apex Marine Corp.*, 498 U.S. 19 (1990)	21
Ratzlaf v. *United States*, 114 S. Ct. 655 (1994)	17, 18
Screws v. *United States*, 325 U.S. 91 (1945)	18
Spies v. *United States*, 317 U.S. 492 (1943)	18
Toth v. *USX Corp.*, 883 F.2d 1297 (7th Cir.), cert. denied, 493 U.S. 994 (1989)	12, 14, 15, 16
Trailways Lines v. *Trailways, Inc. Joint Council of Amalgamated Transit Union*, 785 F.2d 101 (3d Cir.), cert. denied, 479 U.S. 932 (1986)	13, 14, 15
United States v. *Bloch*, 696 F.2d 1213 (9th Cir. 1982)	23
United States v. *Carter*, 311 F.2d 934 (6th Cir.), cert. denied, 373 U.S. 915 (1963)	24
United States v. *Cody*, 722 F.2d 1052 (2d Cir.), cert. denied, 467 U.S. 1226 (1984)	23

Cases—Continued: Page

United States v. *Inciso*, 292 F.2d 374 (7th Cir.), cert. denied, 368 U.S. 920 (1961) 24
United States v. *Keegan*, 331 F.2d 257 (7th Cir.), cert. denied, 379 U.S. 828 (1964) 24
United States v. *Lanni*, 466 F.2d 1102 (3d Cir. 1972) 23
United States v. *Murdock*, 290 U.S. 389 (1933) 18, 24
United States v. *Overton*, 470 F.2d 761 (2d Cir. 1972), cert. denied, 411 U.S. 909 (1973) 23
United States v. *Papia*, 910 F.2d 1357 (7th Cir. 1990) 25, 26
United States v. *Pecora*, 484 F.2d 1289 (3d Cir. 1973) 23
United States v. *Ricciardi*, 357 F.2d 91 (2d Cir.), cert. denied, 384 U.S. 942 (1966) 23-24

Statutes:

Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. VIII, § 801, 98 Stat. 2131 21
Employee Retirement Income Security Act, 29 U.S.C. 1001 *et seq.*:
§ 101(a)(1), 29 U.S.C. 1021(a)(1) 8
§ 102(a)(1), 29 U.S.C. 1022(a)(1) 8
§ 104(a)(1)(D), 29 U.S.C. 1024(a)(1)(D) 8
§ 501, 29 U.S.C. 1131 ..... 2, 12, 18
Labor Management Relations Act, 29 U.S.C. 141 *et seq.*:
§ 302, 29 U.S.C. 186 ..... 2, 8, 9, 11, 12, 14, 17, 18, 19, 22
§ 302(a), 29 U.S.C. 186(a) 12, 13, 19
§ 302(a)(1), 29 U.S.C. 186(a)(1) 2, 8
§ 302(a)(3), 29 U.S.C. 186(a)(3) 20
§ 302(a)(4), 29 U.S.C. 186(a)(4) 20
§ 302(b), 29 U.S.C. 186(b) 13, 19
§ 302(b)(1), 29 U.S.C. 186(b)(1) 2
§ 302(c), 29 U.S.C. 186(c) 19
§ 302(c)(1), 29 U.S.C. 186(c)(1) ... 8, 9, 10, 12, 13, 14, 15, 16, 17
§ 302(c)(1)-(3), 29 U.S.C. 186(c)(1)-(3) 22
§ 302(c)(4)-(9), 29 U.S.C. 186(c)(4)-(9) 19, 20, 23
§ 302(d), 29 U.S.C. 186(d) (1982) 18
§ 302(d), 29 U.S.C. 186(d) 11, 12, 18, 23, 24, 25, 26
§ 302(d)(1), 29 U.S.C. 186(d)(1) 11, 19, 20, 21

Statutes—Continued: Page

§ 302(d)(2), 29 U.S.C. 186(d)(2) 9, 12, 19, 22, 23, 25
18 U.S.C. 371 2
18 U.S.C. 1341 2
29 U.S.C. 504 23
31 U.S.C. 5322(a) 18
31 U.S.C. 5324 18

Miscellaneous:

129 Cong. Rec. (1983):
p. 16,367 21
p. 16,378 21
Labor Management Racketeering Act of 1983: Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 98th Cong., 1st Sess. (1983) 23
S. Rep. No. 83, 98th Cong., 1st Sess. (1983) 21, 22, 23
S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 21, 22

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-830

USX CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

No. 94-831

THERMON PHILLIPS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 19 F.3d 1565.[1]

---

[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 94-830.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1994. A petition for rehearing was denied on August 9, 1994. Pet. App. 41a-42a. The petitions for a writ of certiorari were filed on November 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Alabama, petitioners Phillips, Rich, and USX Corporation (USX) were convicted of conspiracy to violate the Labor Management Relations Act (LMRA or Act), 29 U.S.C. 186, in violation of 18 U.S.C. 371. In addition, petitioners Rich and Phillips were convicted of receiving illegal benefits from an employer, in violation of 29 U.S.C. 186(b)(1). Petitioner USX was convicted on two counts of paying illegal benefits to employee representatives, in violation of 29 U.S.C. 186(a)(1); ten counts of mail fraud, in violation of 18 U.S.C. 1341; and one count of failure to notify potential beneficiaries of a change in their pension plan, in violation of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1131. Petitioner USX was fined $4,105,000 and ordered to pay $290,000 in restitution to the United States Steel and Carnegie Pension Fund. Petitioner Rich was sentenced to 36 months' imprisonment, to be followed by three years' supervised release, and fined $6,000. Petitioner Phillips was sentenced to 30 months' imprisonment, to be followed by two years' supervised release, and fined $6,000. C.A. App. Tabs 4-6.

1. Petitioner USX owns and operates steel mills throughout the United States. The steel workers in the

mills are represented by the United Steelworkers of America, International Union (Union), which every three years negotiates a basic collective bargaining agreement with USX that governs the rates of pay, including pension benefits, of the steel workers. The Union is divided into districts. After the basic agreement is reached, the Union's district directors and subdistrict directors negotiate local collective bargaining agreements with USX that govern working conditions at the steel mills within their districts. Pet. App. 2a-3a.

USX's Fairfield Steel Mill (Fairfield) in Birmingham, Alabama, was located in District 36. In 1983, petitioners Phillips and Rich were the district director and subdistrict director, respectively, of District 36. Phillips and Rich were full-time Union employees. Phillips had worked for USX from 1948 to 1951, and Rich had worked for USX from 1949 to 1964. When Phillips and Rich left USX's employment, the basic agreement provided that a worker who left USX to become a Union employee could request a one-year leave of absence. If USX granted the request, the worker would continue to accrue, for pension purposes, continuous service credits for that year. USX could extend the leave of absence for an additional year, but the basic agreement limited such leaves to two consecutive years. To maintain his pension eligibility, a worker who left USX to accept Union employment had to return to USX before his leave of absence expired. Since Phillips and Rich did not return to USX after accepting Union employment, they were not eligible for pensions. Pet. App. 3a-4a.

In September 1983, six months after USX and the Union had reached a basic agreement, Phillips and Rich began negotiating a local collective bargaining agreement on behalf of the ten Union locals at Fairfield with

William Miller, the USX vice president for labor relations. At that time, Fairfield and several other USX steel mills were idle due to depressed market conditions. USX was not willing to resume production at those mills unless the locals agreed to a permanent reduction in the work force, the elimination of incentive pay, and the discontinuation of certain restrictive work practices. Pet. App. 3a. For their part, Phillips and Rich decided to condition any local agreement on USX's willingness to award them and seven other Union employees sufficient retroactive "continuous service" credits to allow them to retire and to receive a pension from USX. *Id.* at 3a, 5a.

The negotiations over the local agreement involved several meetings over the course of four months. At the first meeting, Phillips and Rich told Miller that the Union wanted the basic agreement amended to authorize the granting of unlimited leaves of absence for workers who wished to leave USX to accept Union employment. Miller responded that USX would not agree to such an amendment. At the second meeting, Rich took Miller aside and told him, "[Y]ou accommodate us and we'll accommodate you." Rich then handed Miller a proposal extending the leaves of absence of Phillips, Rich, and the other seven Union employees "for an indefinite period of time until such person dies or takes pension." Miller sent the proposal to J. Bruce Johnston, the USX executive vice president for employee relations, who consulted with David Roderick, the chief executive officer and chairman of the board of USX. Johnston instructed Miller to reject the proposal. Following another meeting in October 1983, Phillips and Rich told Miller that there would be no local agreement with Fairfield until USX authorized the pensions. Miller responded that USX knew of no way to pay the pensions. Pet. App. 3a, 5a-7a.

In the meantime, USX was demanding concessions similar to those demanded of Fairfield in the negotiations of local agreements with other Union district directors. When the Union refused to grant the concessions, all negotiations ceased in mid-November 1983. Miller, however, continued to communicate with Phillips and Rich. At a meeting on December 23, 1983, Miller told Roderick and Johnston that one of the items still "on the table" at Fairfield was the pensions for Phillips, Rich, and the seven other Union employees. Johnston instructed Miller to reopen the negotiations with Phillips and Rich. Pet. App. 7a.

On December 24, 1983, Miller met Phillips and Rich in Birmingham, and they negotiated a local agreement for Fairfield. Phillips and Rich nevertheless refused to sign the agreement because USX had not agreed to authorize the pensions. Miller called Johnston, who instructed Miller to tell Phillips and Rich that USX would consider their request for retroactive leaves of absence on certain conditions. When Miller relayed the conditions, Phillips and Rich asked Miller whether he believed that USX would grant the pensions. Miller answered that USX would favorably consider the matter. Phillips and Rich then signed the local agreement, which called for a reduction in the work force at Fairfield, reductions in the incentive pay of the mill's workers, and the elimination of the work practices disliked by USX. Shortly afterwards, USX resumed steel production at Fairfield and permanently closed several other plants. Pet. App. 7a-9a; Gov't C.A. Br. 23-24.

In July 1984, several workers at Fairfield filed grievances against USX challenging its interpretation of the local agreement. Phillips and Rich, as the local Union officials, were responsible for determining

whether the grievances would be prosecuted and, if they were not resolved, whether to demand arbitration. When Johnston learned of the grievances, he contacted Miller. On Johnston's instructions, Miller told Phillips and Rich that USX would grant their pensions. The grievances were subsequently withdrawn. Pet. App. 9a.

Shortly thereafter, Johnston drafted an amendment to the basic agreement's leave of absence provision. He did not submit it to the Union because he was advised that the Union members at Fairfield might learn of the amendment and conclude that Phillips and Rich had betrayed them. Instead, Johnston decided to have USX's Corporate Policy Committee, on which he and Roderick served, authorize the pensions that Phillips and Rich sought. Pet. App. 9a-10a.

On October 22, 1984, Johnston submitted to the Corporate Policy Committee a two-part proposal that was adopted the same day. First, the proposal amended the USX Personnel Manual to allow the Committee, in its discretion, to grant leaves of absences for periods in excess of two years to workers who left USX's employment to work for the Union. Second, the proposal granted retroactive leaves of absence to former employees who had left USX's employment to work for the Union and who had lost their right to a USX pension because they had exhausted their leaves of absences. Pet. App. 10a-13a.

Johnston also prepared and signed a standard company form that both recommended and authorized pensions for Phillips, Rich, and four of the Union employees on their list.[2] Johnston backdated the form to January 1, 1984,

---

[2] In fact, only Rich met the requirements of the second part of the proposal that was approved by the Corporate Policy

and indicated that the pensions would be effective March 1, 1984. When the form arrived at the employee benefits office at Fairfield, the benefits office questioned its propriety because it had not been prepared in accordance with USX's standard procedure. After the office supervisor called his superior at USX headquarters, he instructed the benefits office to "keep the matter quiet." Although the form prepared by Johnston was not entered into the record system, the employee benefits office at Fairfield certified to the United States Steel and Carnegie Pension Fund, Inc. (the Administrator), that Phillips, Rich, and the other four Union employees were eligible for pensions. Pet. App. 13a-14a.

Shortly thereafter, Rich and the other four Union employees signed pension applications indicating that they had retired from USX effective March 1, 1984. One of the Union employees also signed a pension application on behalf of Phillips, who was in Florida at the time. The Administrator finished processing the applications on November 19, 1984, and began mailing pension checks on December 1, 1984. Phillips received a total of $55,319, and Rich received $48,318. Although receiving the pensions violated the Union's rules, Phillips, Rich, and the other four Union employees continued to work for the Union. Pet. App. 14a-15a.

Committee. Phillips did not satisfy the requirements because he had left USX to work for another union, and the other four Union employees did not qualify because they had not continuously served bargaining units at the USX division where they had been employed. Pet. App. 15a. Moreover, although more than 50 other Union employees became eligible for pensions under the second part of Johnston's proposal, neither Johnston nor anyone else at USX made any effort to identify the potential pensioners or to include their names on the authorization form. *Id.* at 12a, 14a n.11.

Under an earlier contract, USX had undertaken some of the duties imposed on the Administrator by ERISA, including the duty to notify the Department of Labor and the participants in the pension plan of any material changes to the plan. See 29 U.S.C. 1021(a)(1), 1022(a)(1), 1024(a)(1)(D). The Corporate Policy Committee's adoption of Johnston's proposal constituted a material change in the pension plan because the second part of the proposal created a new class of beneficiaries. USX did not notify the Department of Labor or the pension plan's participants of the new class of beneficiaries created by the adoption of Johnston's proposal. Pet. App. 15a-16a.

2. The grand jury charged that the retroactive leaves of absence granted to Phillips and Rich violated 29 U.S.C. 186(a)(1), which prohibits any employer from giving anything of value "to any representative of any of his employees who are employed in an industry affecting commerce." Petitioners argued that the leaves of absence did not violate the LMRA because they fell within an exception provided in 29 U.S.C. 186(c)(1), which exempts from the Act's prohibition benefits given by an employer to a union official "who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer."[3] Over petitioners' objections, the district

---

[3] Section 302 of the Labor Management Relations Act, 29 U.S.C. 186, provides in pertinent part:

> **(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations**
>
> It shall be unlawful for any employer * * * to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

court instructed the jury that the exception in 29 U.S.C. 186(c)(1) applies "only to payments by an employer to former employees for past services actually rendered by those former employees while they were employees of the employer company." Pet. App. 19a.

The district court also rejected petitioners' argument that 29 U.S.C. 186(d)(2), which provides that any person who "willfully violates" 29 U.S.C. 186 is guilty of a criminal offense, required the government to prove that they acted with the specific intent to violate the law.[4] Over petitioners' objections, the court instructed the jury that "the Government is not required to prove that

---

(1) to any representative of any of his employees who are employed in an industry affecting commerce[.]

* * * * *

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * * * *

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer * * * to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer[.]

[4] 29 U.S.C. 186(d)(2) provides in part that, "[e]xcept for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony."

the pension payments were made by or for USX Corporation or received by the individual defendants with an evil or bad purpose or with intent to violate the law or with knowledge that the law would be or was violated." 94-831 Pet. App. 41a. In addition, the court charged the jury as follows:

> The word ["]wilfully["] means that the person or entity charged as a defendant knowingly and intentionally committed acts which constitute the offense charged and that such acts were not committed accidentally or by some mistake. For example, if USX Corporation caused a pension check to be sent to one of the individual defendants by accident or mistake, such as [a] computer error, such USX Corporation act would not be intentional and thus would not be wilful. On the other hand, if USX Corporation intended for such a pension check to be sent and knowingly caused it to be sent, then that act would be wilful.

Id. at 42a.

3. The court of appeals affirmed. Pet. App. 1a-40a. It ruled that the district court correctly instructed the jury on the scope of the exception provided in 29 U.S.C. 186(c)(1). Pet. App. 18a-23a. The court rejected petitioners' claim that payments given "by reason of" service as a former employee need not be for past services actually rendered by former employees while they were employees to fall within Section 186(c)(1)'s exception. "Because section 186(c)(1) only excepts payments given 'as compensation for' or 'by reason of' an employee's 'service as an employee,'" the court reasoned that "a payment given to a *former* employee must be for

services he rendered *while he was an employee* to qualify for the exception." Pet. App. 21a.

The court of appeals also rejected petitioners' claim that the government was required to prove that they acted with the specific intent to violate 29 U.S.C. 186. Instead, the court held that the term "willfully," as used in 29 U.S.C. 186(d), requires proof only of general intent. Pet. App. 23a-37a. The court pointed out that, "in some contexts, courts have interpreted 'willfully' as requiring a finding of general intent, meaning the intent to engage in the prohibited conduct; that is, acting voluntarily, knowingly, and intentionally, and not accidentally or mistakenly." *Id.* at 24a. The court relied principally on the statutory framework of Section 186, and especially Section 186(d)(1), which indicates that, when Congress required proof of specific intent, it did not rely solely on the word "willfully" but employed additional language to impose that requirement.[5] See Pet. App. 29a-34a.

---

[5] 29 U.S.C. 186(d)(1) provides in part:

> Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, *and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9)* violates this subsection, shall, upon conviction thereof, be guilty of a felony * * * ; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed

The court also noted that four courts of appeals had construed Section 186(d) to require only general intent before Congress amended Section 186(d) in 1984 to create separate subsections (d)(1) and (d)(2). The amendment retained the term "willfully" in both subsections but established a specific intent requirement for prosecutions under subsection (d)(1). Pet. App. 34a-35a & n.27. "Because Congress left the willfulness requirement of former section 186(d) unchanged when it created section 186(d)(2) in 1984," the court "assume[d] that Congress intended 'willfully' to require a finding of only general intent." Pet. App. 34a-35a.[6]

ARGUMENT

1. Petitioner USX contends (Pet. 8-14) that the retroactive credits and pensions that it gave to Phillips and Rich did not violate 29 U.S.C. 186(a), because those payments were sheltered under 29 U.S.C. 186(c)(1) as payments given "by reason of" the former employees' "service as an employee." That contention does not warrant this Court's review.

Section 186 "is, in part, a conflict-of-interest statute designed to eliminate practices that have the potential for corrupting the labor movement." Pet. App. 18a. "It is fairly universally acknowledged that a central purpose of [Section 186] as a whole [is] to prevent employers from bribing union officials." *Toth* v. *USX Corp.*, 883 F.2d 1297, 1300 (7th Cir.), cert. denied, 493 U.S. 994 (1989); see

---

$1,000, such person shall be guilty of a misdemeanor[.] [Emphasis added.]

[6] The court of appeals likewise rejected USX's argument that the district court erroneously instructed the jury that proof of only general intent was required to establish that USX "willfully" violated ERISA, 29 U.S.C. 1131. Pet. App. 37a-40a.

also *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959). Section 186(a) thus prohibits employers from paying anything of value to employees' representatives or union officials, and Section 186(b), in turn, prohibits those representatives and officials from receiving such payments.

The narrow exception provided in Section 186(c)(1) states that Sections 186(a) and (b) are not applicable "in respect to any money or other thing of value payable by an employer * * * to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer." Because Section 186(c)(1) excepts only payments given "as compensation for" or "by reason of" an employee's "service as an employee,"[7] the court of appeals correctly held that the retroactive payments given to Phillips and Rich were not covered by the exception, for those payments had no relation to any "service" that they rendered when they were USX employees. See Pet. App. 21a-22a.

Contrary to petitioner USX's argument (Pet. 9-13), the court of appeals' decision in this case does not conflict with the decision of any other court of appeals. In *Trailways Lines* v. *Trailways, Inc. Joint Council of Amalgamated Transit Union*, 785 F.2d 101, cert. denied, 479 U.S. 932 (1986), the Third Circuit ruled that a provision in a collective bargaining agreement granting employees leaves of absence to work for a union while accumulating pension credits with the company did not

---

[7] Petitioners conceded in the court of appeals that the pension payments in this case were not given "as compensation for" the past service of Phillips and Rich as USX employees. Pet. App. 19a-20a.

fall within the Section 186(c)(1) exception. 785 F.2d at 104-108. In rejecting the claim that the arrangement qualified for the exception because it was offered "by reason of" the former employees' service to Trailways, the Third Circuit found that "[a] logical reading of the statute makes clear that [Section 186(c)(1)] applies solely to payments made as 'compensation [for] or by reason of' the former employees' *past* service to the employer." *Id.* at 106. The Third Circuit concluded that Section 186(c)(1) "contemplates payments to former employees for *past* services actually rendered by those former employees *while they were employees of the company.*" *Ibid.*

In *Toth* v. *USX Corporation*, 883 F.2d 1297, cert. denied, 493 U.S. 994 (1989), the Seventh Circuit considered the leave of absence policy at issue in this case, in the context of a civil action brought by union representatives who were former USX employees and were denied benefits when USX rescinded the policy. The court held that the policy violated Section 186. 883 F.2d at 1300-1306.[8] As petitioner USX points out (Pet. 11), the Seventh Circuit in *Toth* questioned part of the Third Circuit's reading of the language of Section 186(c)(1) in *Trailways*. In particular, the Seventh Circuit suggested that an employer might permissibly make payments under Section 186(c)(1) to former employees, as well as current employees, "as long as the payments are in some way motivated by past service." 883 F.2d at 1304. The Seventh Circuit reasoned that continuing payments to former employees might

---

[8] In *Toth*, petitioner USX argued, contrary to its position in this case, that the leave of absence policy violated Section 186. See 883 F.2d at 1300.

constitute permissible payments "by reason of" past service when those continuing payments were embodied in a collective bargaining agreement, as, for example, when an employee leaves the employer's service temporarily but continues to accrue benefits provided for in the agreement. See *id.* at 1304-1305. The Seventh Circuit stressed, however, that "collective bargaining and inclusion [of the payments] in a generally disseminated collective bargaining agreement, whose terms are uniformly applicable and nondiscriminatory, [would be] crucial." *Id.* at 1304. The Seventh Circuit ultimately concluded that USX's policy could not qualify as "compensation for or by reason of" former employment because, unlike the policy in *Trailways*, USX's leave policy was not a part of a bargained-for labor agreement. *Ibid.*

In light of the decisions in *Trailways* and *Toth*, it is clear that the outcome of this case would not have been different in either the Third Circuit or the Seventh Circuit. Under the Seventh Circuit's reading of Section 186(c)(1), the payments in this case were illegal because they were not "part of the bargained-for collective bargaining agreement" that set the terms of compensation for all the employees in the bargaining unit. *Toth*, 883 F.2d at 1305. The Third Circuit's reading of the exception in Section 186(c)(1) is even narrower than the Seventh Circuit's construction; the Third Circuit would hold that the payments in this case were illegal because they were not directly attributable to past services actually rendered by Phillips and Rich while they were employees of USX. See *Trailways*, 785 F.2d at 106.

While the Third Circuit does not appear to share the Seventh Circuit's view that the exception in Section

186(c)(1) may cover pension credits accumulated by union officials during leaves of absence from their former employer that accrued pursuant to provisions of a collective bargaining agreement, the question whether Section 186(c)(1) covers such credits is not presented in this case. Phillips and Rich were not granted their retroactive leaves of absence to earn pension credits pursuant to a collective bargaining agreement; rather, they obtained the credits under a private arrangement with USX, which USX sought to conceal from the union membership to avoid the perception that Phillips and Rich had betrayed union members. Pet. App. 9a-10a. Likewise, petitioners are not helped by cases involving fringe benefits offered, pursuant to a collective bargaining agreement, to employees on temporary leaves of absence from an employer as well as current employees,[9] or cases in which employers, under such agreements, allow currently employed union officials time off with pay for the purpose of conducting union-related business.[10] No court of appeals that has addressed the scope of Section 186(c)(1) would have found

---

[9] The district court case cited by petitioner USX (Pet. 11) therefore does not support its interpretation of Section 186(c)(1). In *Communications Workers of America* v. *Bell Atlantic Network Services, Inc.*, 670 F. Supp. 416, 419-423 (D.D.C. 1987), the court held only that provisions in collective bargaining agreements permitting employees to take unpaid leaves of absence for union business without losing fringe benefits fell within the exception provided in Section 186(c)(1). In reaching that conclusion, the court reasoned that the terms of employment for which unions bargain (including the possibility of unpaid leave) should be considered part of the compensation for which employees work. 670 F. Supp. at 419-420; accord *Toth*, 883 F.2d at 1304.

[10] See *BASF Wyandotte Corp.* v. *Local 227, International Chemical Workers Union*, 791 F.2d 1046, 1048-1051 (2d Cir. 1986).

the payments in this case to be lawful, and this case does not implicate any broad-ranging policy issues regarding the scope of the Section 186(c)(1) exemption.[11]

2. Petitioners contend (94-830 Pet. 14-19; 94-831 Pet. 9-24) that the government was required to prove that they acted with specific intent to violate the law to establish that they "willfully" violated 29 U.S.C. 186. That contention also does not warrant this Court's review.

a. Contrary to the individual petitioners' contention (Pet. 12-15), this Court did not hold, in *Ratzlaf* v. *United*

---

[11] Petitioners Phillips and Rich rely (Pet. 7) on a 1977 letter from the Department of Labor as support for their assertion that the continued accrual of pension credits while an employee is on a leave of absence and working as a union official was thought to be permissible. That letter, however, specifically disclaimed any authority on the part of the Labor Department to "provide a definitive opinion as to whether a violation would occur in connection with the situation described," and it addressed the issue only "[i]n the abstract." Moreover, the letter concerned an employee who was "on a leave of absence without pay from a company to serve as a union officer," not (as in this case) former employees who sought to be placed on unpaid leave retroactively. Moreover, in a 1979 letter, the Department of Labor concluded that a "former employee" who was "on leave" from the employer and working for a union could not be "placed back" in the employer's pension plan, because of the strictures of Section 186. The Department expressed the view that "the payment by a company into a pension plan for an employee of the labor organization * * * who renders no service to the company" would violate Section 186. That situation more closely resembles this case.

Likewise, the 1980 Department of Labor report relied on by USX (Pet. 9), which surveyed unpaid leave arrangements embodied in collective bargaining agreements, has no relevance to this case, which does not involve any provision of a collective bargaining agreement.

States, 114 S. Ct. 655 (1994), that the use of the term "willfully violates" in every criminal statute requires proof of specific intent.[12] In *Ratzlaf*, the Court construed the term "willfully" in 31 U.S.C. 5322(a), the criminal enforcement provision for the prohibition in 31 U.S.C. 5324 against structuring currency transactions for the purpose of evading a financial institution's reporting requirement. Although the Court held that Section 5322(a) required proof that the defendant acted with knowledge that the structuring in which he engaged was unlawful, 114 S. Ct. at 663, the Court emphasized that "willfully" is "a 'word of many meanings,' and 'its construction [is] often * * * influenced by its context.'" *Id.* at 659 (quoting *Spies* v. *United States*, 317 U.S. 492, 497 (1943)); see also *Screws* v. *United States*, 325 U.S. 91, 101 (1945) (plurality opinion); *United States* v. *Murdock*, 290 U.S. 389, 395 (1933).

"[I]n many contexts, * * * 'willfully' refers to consciousness of the act but not consciousness that the act is unlawful." *Cheek* v. *United States*, 498 U.S. 192, 209 (1991) (Scalia, J., concurring in the judgment). In this case, the court of appeals correctly held that "willfully," as used in 29 U.S.C. 186(d), requires proof only of general intent. The criminal enforcement provision of Section 186 is set forth in subsection (d). Before subsection (d) was amended in 1984, it provided that "[a]ny person who willfully violates any of the provisions of * * * section [186] shall * * * be guilty of a misdemeanor." 29 U.S.C. 186(d) (1982). When Congress amended subsection (d) in

---

[12] Indeed, neither the individual petitioners nor USX takes issue with that portion of the court of appeals' opinion (Pet. App. 37a-40a) holding that ERISA's criminal enforcement provision, 29 U.S.C. 1131, which employs the phrase "willfully violates," requires only proof of general intent.

1984 to make some violations of Section 186 felonies, it also divided subsection (d) into two parts. Subsection (d)(1) applies to payments that are illegal because they do not satisfy certain technical requirements of subsections (c)(4)-(9). For those violations, 29 U.S.C. 186(d)(1) requires proof that the person participating in the payment acted "willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment." Subsection (d)(2) applies to all other illegal payments that are not covered by subsection (d)(1), *i.e.*, payments prohibited by subsections (a) and (b) for which Congress did not provide any exception in subsection (c). For those violations, subsection (d)(2) requires proof only that the parties participating in the payment "willfully violate[d] this section."

In light of that statutory structure, the court of appeals correctly found that "Congress had to have intended the term 'willfully' as used in both sections 186(d)(1) and (d)(2) to require a finding of general intent; otherwise the [additional] 'intent to benefit' language in section 186(d)(1) would be superfluous, because a person who had the specific intent to violate [Section 186] would also necessarily intend to benefit himself or to influence a union official." Pet. App. 31a-32a. As the court explained, under petitioners' interpretation, the additional intent requirement of Section 186(d)(1) would serve little or no purpose, for it would exclude from the reach of criminal liability only those "payments made with the specific intent to violate the law, but without the intent to benefit himself or influence the recipient." *Id* at 32a.[13]

---

[13] Petitioners Phillips and Rich assert (Pet. 19-20) that the court of appeals' reasoning is "specious" because an employer and

In addition, as the court of appeals explained (Pet. App. 32a-33a), other aspects of the statutory scheme confirm that the term "willfully" requires proof only of general intent. The criminal enforcement provision applicable to Section 186 prohibits payments if the employer acts "willfully," yet Sections 186(a)(3) and 186(a)(4) bar payments by an employer only if the employer also acts with an "intent to influence" the recipient. Given that the "intent to influence" language applies only to subections (a)(3) and (a)(4), the court of appeals concluded that "Congress must have intended sections 186(a)(1)-(2) to prohibit payments to representatives even if they were made without any intent to influence." Pet. App. 33a. But it would be "nonsensical" to suppose that Congress intended to create a criminal prohibition that applied to "payments made to employee representatives without any intent to influence but with specific intent

---

union may knowingly violate the technical requirements of subsections (c)(4)-(9) without having any intent to confer an improper benefit on anyone. But, as the court of appeals observed (Pet. App. 32a), it is doubtful that such a "scenario could actually occur, let alone [that] Congress intended such an absurd statutory scheme." In the absence of an intent to obtain or confer an improper benefit, there appears to be no reason for anyone who knows about the technical requirements of subsections (c)(4)-(9) to disregard them, and petitioners offer none. Moreover, it is highly unlikely that Congress added the intent-to-benefit requirement to subsection (d)(1) to protect from criminal prosecution those persons who knowingly disobeyed the law, but who did not intend to reap any personal benefit. Rather, Congress sought, in subsection (d)(1), to exempt from criminal prosecution those persons who committed acts that contravened subsections (c)(4)-(9), but who did not intend to benefit someone prohibited by the statute from receiving things of value and did not know that the intended beneficiary was prohibited from receiving things of value, *i.e.*, persons acting only with general intent.

to violate the law." *Ibid.* In sum, "[t]he double enforcement provision in section 186(d) and the dual structure of prohibited payments in section 186(a) suggest that Congress intended the term 'willfully' to require proof only that the payment was made knowingly and intentionally, not accidentally or by some mistake." *Id.* at 34a.

b. The court of appeals also noted that, "[w]hen Congress amended Section 186(d) in 1984, it made no attempt to change the clear majority rule [in the courts of appeals] that 'willfully' required a finding of only general intent." Pet. App. 34a. "Because Congress left the willfulness requirement of former section 186(d) unchanged when it created section 186(d)(2)," the court "assume[d] that Congress intended 'willfully' to require a finding of only general intent." *Id.* at 34a-35a. See *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

The court of appeals' analysis is supported by the legislative history of the 1984 amendments to Section 186. The amendments were enacted as part of Chapter VIII of the Comprehensive Crime Control Act of 1984, and were identical to amendments contained in a labor-racketeering bill passed by the Senate in 1983.[14] The Senate committee reports accompanying the 1984 Act and the 1983 bill indicate that Congress included the "intent to benefit" language in Section 186(d)(1) precisely because it was concerned that "willfully" carried the connotation of general intent, and that a

---

[14] See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 801, 98 Stat. 2131; S. Rep. No. 225, 98th Cong., 1st Sess. 297 & n.1 (1983); cf. 129 Cong. Rec. 16,367, 16,378 (1983); S. Rep. No. 83, 98th Cong., 1st Sess. 2 (1983).

person could be prosecuted for a willful violation of the law even if he believed his actions were lawful. The 1984 committee report states, for example:

> Title VIII grants special treatment to transactions addressed by [29 U.S.C. 186(c)(4) through (9)]. These subsections contain exceptions, often technical in nature, to the prohibitions contained in [29 U.S.C. 186(a) and (b)]. *Because a person can violate a prohibition of [29 U.S.C. 186(a) and (b)] even though he proceeded in the belief that his conduct fell within the excepted behavior of [29 U.S.C. 186(c)(4) through (9)]*, title VIII adds to the "willful" requirements for this behavior the additional element that such conduct be "with intent to benefit himself or to benefit other persons whom he knows are not permitted to receive such payment, loan, money or other thing of value under subsection (c)(4) through (c)(9)."

S. Rep. No. 225, 98th Cong., 1st Sess. 298 (1983) (emphasis added).

The 1983 Senate report also expressed the concern that, without the "intent to benefit" language, one could violate Section 186 "simply because of a failure to satisfy one of the technical requirements for an exemption stated in subsections (c)(4) through (c)(9)." S. Rep. No. 83, 98th Cong., 1st Sess. 12-13 (1983). The 1983 bill did not, however, add any additional element to Section 186(d)(2) for violations of Sections 186(c)(1) through 186(c)(3). To the contrary, the committee noted that the transactions proscribed by subsections (c)(1)-(3) "are not likely to be innocently motivated. Rather, the very fact of the payment generally shows the attributes of self-dealing and abuse of position that justify the criminal

penalty." S. Rep. No. 83, *supra*, at 13. Therefore, the committee determined "not to include a specific intent requirement for prosecutions under subsection (d)(2). The mens rea requirement for prosecutions under subsection (d)(2) will continue to be 'willfully.'" *Ibid.*[15]

c. The court of appeals' conclusion that "willfully," as used in 29 U.S.C. 186(d)(2), does not require proof of specific intent to violate the law is consistent with decisions of the Second, Third, Sixth, and Ninth Circuits, all of which held, before Section 186(d) was amended in 1984, that its use of "willfully" required only proof of general intent. See *United States* v. *Cody*, 722 F.2d 1052, 1059 (2d Cir.), cert. denied, 467 U.S. 1226 (1984); *United States* v. *Bloch*, 696 F.2d 1213, 1216 (9th Cir. 1982); *United States* v. *Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973); *United States* v. *Overton*, 470 F.2d 761, 767 (2d Cir. 1972), cert. denied, 411 U.S. 909 (1973); *United States* v. *Lanni*, 466 F.2d 1102, 1110 (3d Cir. 1972); *United*

---

[15] Petitioners Phillips and Rich state (Pet. 20 n.11) that the Department of Justice assured the Senate in 1983 that "willfully" connotes a specific intent to disobey the law. The letter relied on by petitioners, from Assistant Attorney General Robert McConnell to Senator Orrin Hatch, concerned the definition of "willfully" in a different provision, 29 U.S.C. 504. See *Labor Management Racketeering Act of 1983: Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 150 (1983) (*1983 Hearing*). More pertinently, at a hearing on the 1983 Senate bill, Assistant Attorney General Lowell Jensen submitted for the record a statement that observed that, under the proposed amendments to Section 186, illegal employer payments to union officials (like the ones at issue in this case, but unlike the ones covered by subsections (c)(4)-(9)) "which are not transmitted through and used by unions, benefits plans, and cooperation committees * * * will continue to be prosecuted under Section 186 without proof of evil intent or bad motive as under current law." *1983 Hearing*, *supra*, at 104.

States v. *Ricciardi*, 357 F.2d 91, 100 (2d Cir.), cert. denied, 384 U.S. 942 (1966); *United States* v. *Carter*, 311 F.2d 934, 943 (6th Cir.), cert. denied, 373 U.S. 915 (1963).[16]

The Seventh Circuit does appear to have taken a different approach, although, as the individual petitioners appear to acknowledge (Pet. 23-24), that court's decisions are not fully consistent with one another. In *United States* v. *Inciso*, 292 F.2d 374, 380 (7th Cir.), cert. denied, 368 U.S. 920 (1961), the court held that Section 186(d) "contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section." Subsequently, in *United States* v. *Keegan*, 331 F.2d 257, 262 (7th Cir.), cert. denied, 379 U.S. 828 (1964), the court held that, because the element of willfulness is satisfied by a showing of recklessness, Section 186(d) does not require proof of a specific intent

---

[16] The decision below does not conflict with the Tenth Circuit's decision in *Korholz* v. *United States*, 269 F.2d 897 (1959), cert. denied, 361 U.S. 929 (1960). In that case, the Tenth Circuit upheld against a defendant's challenge a jury instruction that a person must be "either conscious of the fact that what he is doing constitutes a violation of the law or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law or not." 269 F.2d at 903. As the court of appeals noted (Pet. App. 34a-35a n.27), the Tenth Circuit's discussion of Section 186(d) in *Korholz* is "too cryptic * * * to draw a conclusion about whether a general intent instruction would have been upheld." Moreover, the Tenth Circuit also rejected the defendants' contention that the district court should have required the jury to acquit "unless they found that the payments were made with a bad purpose or motive and without justifiable excuse," 269 F.2d at 903, relying on this Court's statement in *United States* v. *Murdock*, 290 U.S. 389, 394 (1933), that "willfully" often denotes "that which is 'intentional, or knowing, or voluntary,' as distinguished from accidental.'"

to disobey the law, but only proof that a reasonable person "would be aware that [the] conduct would likely be illegal." The court of appeals noted in this case (Pet. App. 34a-35a n.27) that such a jury instruction is "the practical equivalent of a general intent jury instruction."

More recently, in *United States* v. *Papia*, 910 F.2d 1357, 1362 (1990), the Seventh Circuit appeared to reaffirm its holding in *Inciso* that Section 186(d) requires "an awareness of or reckless disregard for § 186(d)'s restrictions." In *Papia*, however, the court upheld the trial court's jury instruction that "[a]n act is done 'willfully' if done voluntarily and intentionally with the intent to do something the law forbids; that is to say, with a purpose either to disobey or disregard the law," against the defendant's contention that the trial court should have required the government to show that she acted with an intent to benefit herself or another. *Ibid.* (emphasis omitted). Because the court concluded that the jury was given a specific intent instruction similar to the one requested by the defendant, it did not need to decide whether Section 186(d)(2) required such an instruction. Thus, as the court of appeals noted (Pet. App. 28a n.23), the Seventh Circuit's decision in *Papia* does not address the question presented in this case.

Papia is the only appellate decision other than the decision below to consider the meaning of "willfully" in 29 U.S.C. 186(d) since it was amended in 1984. Moreover, the *Papia* court's consideration of the significance of the post-amendment statutory structure of Section 186(d) for the definition of "willfully" was limited, because one count at issue in *Papia* concerned conduct predating the 1984 amendment, and the other two counts concerned post-amendment conduct for which the government was

required to show that the defendant acted with an intent to benefit herself or another. See 910 F.2d at 1363. Unlike the court of appeals in this case, the court in *Papia* did not consider whether an interpretation of "willfully" to require specific intent would render other parts of the statute superfluous, nor did it consider the legislative history of the 1984 amendments to Section 186(d). If the issue returns to the Seventh Circuit, that court will now have the benefit of the extensive statutory analysis of the Eleventh Circuit, which is the only court of appeals to have examined the post-amendment structure of Section 186(d) in depth. Moreover, since the definition of "willfully" has been litigated in the courts of appeals only twice since 1984, there does not appear to be any pressing need for the Court to decide the issue now. Accordingly, review by this Court is not warranted at this time.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

FEBRUARY 1995

Supreme Court, U.S.
FILED
FEB 15 1995

(4)

No. 94-831

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

THERMON PHILLIPS and E. B. RICH,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

LAURENCE GOLD *
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
* Counsel of Record

ALBERT C. BOWEN
BEDDOW, ERBEN & BOWEN
2019 Third Avenue North
Birmingham, AL 35203

J. MARK WHITE
WHITE, DUNN & BOOKER
1200 First Alabama Bank Bldg.
Birmingham, AL 35203
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-831

THERMON PHILLIPS and E. B. RICH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF FOR PETITIONERS

ARGUMENT

The treatment in the Government's Brief in Opposition of this Court's decision last Term in *Ratzlaf v. United States*, 114 S. Ct. 655 (1994), demonstrates that the recurring legal issue raised in this case requires this Court's attention.

The statute in *Ratzlaf* and the statute in this case follow a path Congress frequently takes: both provide that any person who fails to comply with the civil or regulatory norm prescribed in the statute is subject to defined injunctive or monetary penalties, and both reserve heightened sanctions—in this case, criminal sanctions—for those who "willfully violate" the norm.

The *Ratzlaf* Court held that the words "willfully violating," which triggered heightened sanctions under the statute involved in that case, could *not* be construed to require *only* general intent. 114 S. Ct. at 659. The Court deemed it so evident that the words "willfully violating" require more than general intent that the Court declined, despite "contrary indications in the statute's legislative history," to "resort to legislative history to cloud a statutory text that is clear." *Id.* at 652.

The Government's brief in opposition to the petition for certiorari proceeds on the premise that this analysis has *no* significance outside the particular statute involved in *Ratzlaf*. Notwithstanding *Ratzlaf*—and, notwithstanding the rule of lenity [1]—the Government argues that the Eleventh Circuit was plainly correct in holding that a defendant may be found to have "willfully violated" 29 U.S.C. § 186, and thus to be subject to criminal sanctions, in the absence of any finding that the defendant knew of the requirements of the statute, much less that he knew his conduct might violate those requirements. In so arguing, the Government does not dispute that, if the words "willfully violates" were construed to require no more than general intent, those words would be entirely superfluous, because general intent must be proved to sustain a conviction even where a statute contains no willfulness requirement. *See* Petition at 18. (Compare *Ratzlaf*'s recognition that a statutory willfulness requirement cannot be treated "essentially as surplusage--as words of no consequence." 114 S. Ct. at 659).

The Government is able to take this approach only by ignoring *Ratzlaf*'s holding and by trivializing its reasoning. The *Ratzlaf* Court, in holding that the phrase "willfully violating" requires more than general intent, refused to "resort to legislative history to cloud a statutory text

---

[1] *See* 114 S. Ct. at 663 (citing *Crandon v. United States*, 494 U.S. 152, 160 (1990)).

that is clear." 114 S. Ct. at 662.[2] The Government nevertheless embarks on precisely such an enterprise at pages 18-23 of the Brief in Opposition, pulling out small pieces of legislative history and drawing dubious inferences from equivocal features of the statutory structure in an effort to find some support for the proposition that only general intent need be proved to establish a criminal violation of § 186.[3] Behind these niceties the real point is that the Government is intent on ignoring *Ratzlaf* in enforcing the run of criminal statutes containing a "willful violation" requirement—other than the statute at issue in

---

[2] The Government makes much of the Court's statement in *Ratzlaf* that " '[w]illful' . . . is a 'word of many meanings,' and 'its construction [is] often . . . influenced by its context.' " 114 S. Ct. at 659 (quoting *Spies v. United States*, 317 U.S. 492, 497 (1943)). *See* Brief in Opposition at 18. We were explicit that there is more than one kind of "willfulness" requirement; in particular, a requirement that a specified *act* be "willful" is very different from a requirement that a *violation* be "willful." *See* Petition at 14 and n.7. The fact remains that, where the statutory context is one in which a *violation*, rather than merely an *act*, must be shown to have been willful, *Ratzlaf* and its lower court precursors demonstrate that general intent is *not* sufficient to sustain a criminal conviction. *See Ratzlaf* and the cases cited in the Petition at 16 n.8. Nowhere in the Brief in Opposition does the Government even address this point.

[3] The Government's argument from the statutory structure rests on the contention that, if "willfully violates" is construed to require knowledge or reckless disregard of the law, then the separate "intent to benefit" requirement made applicable to certain violations by the 1984 amendments is rendered superfluous. *See* Brief in Opposition at 18-21. That contention is wrong. The Government has no satisfactory response to our point that an intent to benefit is *not* the same as knowledge or reckless disregard of the law; and that it is not at all implausible to conclude that Congress intended to impose *both* of those distinct requirements before a criminal violation may be found with respect to the highly technical provisions to which the "intent to benefit" proviso is applicable. *See* Petition at 19-20. It is the Government's construction of § 186, not petitioners,' that violates the canon against treating statutory terms as superfluous.

Ratzlaf—and, most certainly, in enforcing 29 U.S.C. § 186.

The question whether general intent suffices to establish criminal culpability under the important labor statute involved in this case is a matter of substantial significance in and of itself. And, the Government acknowledges that there is a conflict in the circuits on that question. *See* Brief in Opposition at 24-26. The Brief in Opposition serves to place in bold relief the more far reaching question underlying this case: Is *Ratzlaf* a decision having no implications for all the statutes, other than the statute at issue there, that use the words "willfully violate" as the trigger for heightened sanctions, or does *Ratzlaf* stand for the basic proposition that the words "willfully violat[e]" have a core meaning requiring more than general intent. That is most certainly a question this Court should decide.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, this Court should grant the petition for certiorari.

Respectfully submitted,

LAURENCE GOLD *
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
* Counsel of Record

ALBERT C. BOWEN
BEDDOW, ERBEN & BOWEN
2019 Third Avenue North
Birmingham, AL 35203

J. MARK WHITE
WHITE, DUNN & BOOKER
1200 First Alabama Bank Bldg.
Birmingham, AL 35203
Counsel for Petitioners